SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957 1958

No. 652

JAMES CLIFTON HAWKINS, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1957
CERTIORARI GRANTED JANUARY 20, 1958

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 5646

JAMES CLIFTON HAWKINS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS RELIED UPON BY APPELLANT IN HIS APPEAL—Filed June 11, 1957

Comes now the appellant, James Clifton Hawkins, and designates the points upon which he relies in his appeal in this cause as follows:

1. The Court erred in permitting the wife of the appellant to testify on behalf of the Government over the objection of the appellant.

2. The Court erred in permitting the introduction of testimony concerning the conduct of the victim, Lola Faye Mowdy, in the City of Tulsa, out of the presence of the appellant of which appellant had no knowledge or control.

3. The Court erred in over-ruling the motion of the appellant to grant a judgment of acquittal at the conclusion of the governments evidence.

4. The Court erred in over-ruling the motion of the appellant to grant a judgment of acquittal at the conclusion of all the evidence in the case.

Respectfully submitted.

Cleon A. Summers, Attorney for Appellant.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 12,849, Criminal.

UNITED STATES OF AMERICA, Plaintiff,

v.

JAMES CLIFTON HAWKINS, Defendant.

INDICTMENT—Filed September 10, 1956

The Grand Jury Charges:

On or about November 23, 1955, James Clifton Hawkins knowingly transported Lola Faye Mowdy in interstate commerce from Mena, Arkansas, to Tulsa, Oklahoma, in the Northern Judicial District of Oklahoma, for immoral purposes.

A True Bill

Charles H. Froeb, Assistant U. S. Attorney.

Francis (illegible) Beace, Foreman.

IN UNITED STATES DISTRICT COURT

VERDICT—Filed October 2, 1956

We, the Jury, find the defendant, James Clifton Hawkins, ... guilty, as charged in the indictment.

Date: Oct. 2, 1956

J. O. Crider, Foreman.

[fol. 4]

IN UNITED STATES DISTRICT COURT

JUDGMENT AND COMMITMENT—November 28, 1956

On the 2nd day of October, 1956, came the attorney for the government and the defendant appeared in person and by counsel, Cleon A. Summers.

It Was Adjudged that the defendant had been convicted upon his plea of not guilty and a verdict of guilty of the offense of having violated Title 18, U.S.C., 2421, as charged in the Indictment.

It Was Adjudged that the defendant was guilty as charged and convicted, and imposition of sentence was passed.

Now, on this 28th day of November, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Cleon A. Summers. The court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

W. R. Wallace, United States District Judge.

Approved as to form: Charles H. Froeb, Assistant U. S. Attorney.

In United States District Court

Notice of Appeal—Filed November 28, 1956

Name and address of appellant; James Clifton Hawkins, P. O. Box 85, Cove, Arkansas.

[fol. 5] Name and address of appellant's attorney; Cleon A. Summers, 410 Surety Building, Muskogee, Oklahoma.

Offense; violation of Mann Act, Title 18, Section 2421, U.S.C.

Concise statement of judgment or order, giving date, and any sentence; Sentenced November 28th, 1956 to the custody of the Attorney General for a term of five years.

Name of institution where now confined, if not on bail; Admitted to bail.

I, the above named appellant, hereby appeal to the United States Court of appeals for the Tenth Circuit from the above stated judgment.

Dated November 28, 1956.

James Clifton Hawkins, Appellant

Cleon A. Summers, Attorney for Appellant.

In United States District Court

Clerk's Note Re: Orders Extending Time for Docketing Cause

[By orders of December 31, 1956, and March 7 and April 23, 1957, the time for docketing the cause in the Court of Appeals was extended to June 15, 1957.]

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF TRIAL PROCEEDINGS

*****

LOLA FAY MOUDY, called as a witness on behalf of the plaintiff, testified:

Direct examination,

By Mr. Froeb:

Q. Will you state your name to the jury, please?
A. Lola Fay Moudy.
Q. How old are you, Lola?
A. 18.
[fol. 6] Q. And what year were you born?
A. '38.
Q. 1938?
A. Uh huh.
Q. What was the month and the day?
A. The 28th of August.
Q. 28th of August?
A. Uh huh.
Q. And are you married or single?
A. Married.
Q. And what is your husband's name?
A. Boyd.
Q. And how long have you been married, Lola?
A. Be two months the 4th of this month.
Q. Where are you living now?
A. Salem, Oregon.
Q. And how long have you lived in Salem?
A. I've been up there about six months.
Q. And where did you live prior to that time?
A. Over close to Beachland, Oklahoma.
Q. Is that near Dogpatch, Oklahoma?
A. Yes, sir.
Q. How far is that from Mena, Arkansas?
A. It's probably about 17 miles, something like that.
Q. 17 miles?
A. Maybe farther, I don't know.

Q. Did you go to school in the Beachland community?
A. Yes.
Q. How much education did you have?
A. I went two years to high school.
Q. You were 16 then when you left high school?
A. Yes, something like that.
Q. What does your father do, Lola?
A. Well, he's working down in Texas somewhere.
Q. What kind of work does he do?
A. Farm work, I think.
Q. Farm work?
A. Uh huh.
Q. Does he pick cotton?
A. Yes.
Q. How many children are there in the family?
A. There was seven.
Q. Seven?
A. (Nods affirmatively.)
Q. Are you the oldest?
A. Yes.
Q. Now do you know the defendant, James Clifton Hawkins?
A. Yes.
Q. Can you point him out to us?
A. Right there.
Q. How long have you known him, Lola?
A. I met him last fall, maybe the summer, I don't know.
Q. About the summer of 1955?
A. (Nods affirmatively.)
Q. Now where did you first meet him?
A. At the Narrows.
Q. At the Narrows, is that near your home?
A. Yes.
[fol. 7] Q. Is that down in the southeast corner of Oklahoma?
A. Well, I don't know what direction it is.
Q. Is it near Dogpatch?
A. Oh, it's a good ways from Dogpatch.
Q. Now did you ever make a trip to Tulsa with the defendant, James C. Hawkins?
A. Yes.

Q. Can you tell us what the purpose of that trip was?

Mr. Summers: I object to that, your Honor.

The Court: Well, yes.

By Mr. Froeb:

Q. Will you tell us what the circumstances were that occasioned your going on that trip, will you tell the Court that?

A. You mean what I was going up there for?

Q. Yes, when was it that you made this trip to Tulsa?

A. It was sometime in November.

Q. In November. Was it after the middle of November?

A. Yes.

Q. Was that the first time you had been up to Tulsa?

A. Yes.

Q. Is that the only trip you made up to Tulsa with Hawkins?

A. Yes.

Q. All right. Now did you have a conversation with Hawkins prior to going on this trip?

A. Yes.

Q. And who was present at the conversation, just you and Hawkins?

A. Yes.

Q. Is that right? Well, now, will you tell us in substance, can you tell the jury what the conversation was that you had with Hawkins prior to going on this trip?

A. Well, I was working over at Ralph Nichols at that time.

Q. Tell the Court who Ralph Nichols is.

A. Who he is?

Q. (Nods affirmatively.)

A. He owns a place there in Dogpatch.

Q. He owns a place in Dogpatch?

A. He did.

Q. What kind of a place is it?

A. Well, it was just a tavern.

Q. Just a tavern?

A. Sold beer.

Q. Now is there another tavern there in Dogpatch, or bar?

A. No, not where they sell beer.

Q. Well, does James Hawkins work in Dogpatch?

[fol. 8] A. Well, he owned that dance hall down there.

Q. He owns the dance hall?

A. (Nods affirmatively.)

Q. I see. And how many buildings are there in Dogpatch?

A. Well, there's two, I think.

Q. Just two?

A. Unless they've built one since I've been over there.

Q. All right. What was this conversation that you had with Hawkins? Would you relate that to the jury?

A. Yes. I said I wanted to find a better job or something, make more money, and he asked if I wanted to come up here with Jane.

Q. Will you talk a little louder, please?

A. Yes. He asked me if I wanted to come up here to Tulsa and work with Jane.

Q. And work with Jane?

A. Uh huh.

Q. Who is Jane?

A. Who is she?

Q. Yes.

A. That's Jane Wilson.

Q. Jane Wilson, who is she?

A. I don't know who she is. I mean I know her.

Q. Is she related to Hawkins in any way?

A. Well, I don't know.

Q. Have you seen her with Hawkins?

A. Yes.

Q. All right, so he wanted you to work with Jane, is that right?

Mr. Summers: We object to that, your Honor. She didn't say that he wanted her to work anywhere.

The Court: Let her make the statement.

The Witness: He asked me if I wanted to.

By Mr. Froeb:

Q. To work with Jane?

A. Yes.

Q. Did you know what that meant?

A. Well, yes.

Q. Did you ask him again what it meant?

A. Well, it was just as a prostitute.

Q. All right, and you knew that, did you understand from the conversation that you were to work with Jane as a prostitute?

Mr. Summers: I object to that as leading, your Honor.

[fol. 9] The Court: Yes, sustained.

By Mr. Froeb:

Q. What did you understand then specifically from that conversation?

A. What did I understand?

Q. Yes, what was your understanding?

A. Well, that I was supposed to, I was to come up here in Tulsa and work in a hotel, what they call it.

Q. As a prostitute?

A. Yes.

Q. Now you had this conversation then prior to making this trip, is that right?

A. Yes.

Q. Did you make the trip right away after the conversation?

A. Yes.

Q. The same day?

A. Well, I don't remember whether it was the same day or not we left.

Q. Was it within a day after?

A. Yes, something like that.

Q. At the longest, within a day after, is that right?

A. (Nods affirmatively.)

Q. All right. Will you tell us—I take it you had this—you testified, did you not, that you had this conversation there in the Beachland community some place?

A. No, it was around Dogpatch.

Q. It was around Dogpatch?

A. Uh huh.

Q. Specifically, can you remember just where it was that you had the conversation?

A. No.

Q. Well, now, did you leave, did you plan to leave with Hawkins then right after that conversation?

A. Yes.

Q. Where did you first go?

A. We went first to Mom and Dad's and picked up my clothes.

Q. Mom and Dad's, that's your house?

A. Yes.

Q. Were you living there with your Mom and Dad?

A. Yes.

Q. And you picked up your clothes?

A. Yes.

Q. Now who was at the house when you picked up your clothes?

A. Mom and Daddy and the children.

Q. Did you have a conversation with your father?

A. Yes.

Mr. Summers: Object to that, your Honor.

The Court: Yes.

[fol. 10] Mr. Froeb: I haven't asked what the conversation was, your Honor.

Mr. Summers: Your Honor please, the conversation isn't admissible.

The Court: The conversation, of course, what was said isn't admissible, but the fact that she had a conversation with her father is admissible.

By Mr. Froeb:

Q. Did you have a conversation with your father?

A. Yes.

Q. What is his name, please?

A. L. V., L. V. Moudy.

Q. L. V. Moudy. I take it you went into the house to get your clothes?

Mr. Summers: Your Honor, I object to that.

The Court: Yes, sustained. Don't lead the witness.

By Mr. Froeb:

Q. You testified that you went into the house to get your clothes, is that correct?

A. Yes.
Q. Now where was Hawkins at this time?
A. In the car.
Q. What kind of a car is that, Lola?
A. Cadillac.
Q. Cadillac. Can you describe the upholstery on the Cadillac?
A. It's leopard skin.
Q. Are there any other marks or identifications on the Cadillac?
A. His name is wrote across the back seat.
Q. His name?
A. "Hawk".
Q. "Hawk". Now did your father know that Mr. Hawkins was outside?

Mr. Summers: Object to that, your Honor.
The Court: Sustained.

[fol. 11] By Mr. Froeb:

Q. Did Hawkins talk to your father?
A. No.
Q. Did you tell your parents where you were going?
A. I told my Mom I was going to Vernon, Texas, down where my cousin's at.
Q. And you didn't tell them you were going to Tulsa, is that right?
A. No.
Q. What was your reason for doing that?

Mr. Summers: Object to that.
The Court: Sustained.

By Mr. Froeb:

Q. Did you then go up, did you then get back in the car with Hawkins?
A. Yes.
Q. And where did you go next?
A. Well, we, that's when we started.
Q. All right. What was the first stop, then?

A. We stopped at his cabin and he picked up some clothes.

Q. Where was that?

A. Hatfield.

Q. Hatfield?

A. Arkansas.

Q. Did you stop at Mena, Arkansas?

A. Yes.

Q. And what happened, where was it in Mena that you stopped?

A. It was a station right by the bus station.

Q. And did anything happen there at the station that you remember?

A. He put a headlight in the car.

Q. Put a headlight on the car?

A. (Nods affirmatively.)

Q. All right, now then from Mena, where was the next stop after Mena, Arkansas?

A. Muskogee.

Q. Muskogee. What happened there?

A. We stopped and ate.

Q. Where was it that you ate?

A. I didn't know the name of the place. It was outside of town a little ways, wasn't right in Muskogee.

Q. What kind of a place was it?

A. Well, it was just a place to eat, and they danced in there, and it was colored and white people both in there.

Q. Night club, would you call it a night club?

[fol. 12] A. Well, you might call it that.

Q. Now you testified that you ate dinner there, is that correct?

A. Yes.

Q. And then what happened after that?

A. We came here to Tulsa.

Q. All right, now about what time was it when you hit Tulsa?

A. I don't know. It was after midnight, along towards daylight.

Q. And where did you stop here in Tulsa?

A. At a filling station.

Q. And did Hawkins get out of the car?

A. Yes.
Q. And what did he do after he got out of the car?
A. Made a phone call.

Mr. Summers: Object unless she knows.
The Court: Do you know what he did?
The Witness: Made a phone call.

By Mr. Froeb:

Q. He made a phone call?
A. Uh huh.
Q. All right, and did he say anything to you after he made the phone call?
A. Not that I remember.
Q. All right, then what happened after that?
A. Jane and Tommie came down there.
Q. Now who is this "Jane" again?
A. Jane Wilson.
Q. Jane Wilson; who is Tommie?
A. I don't know what her last name is.
Q. All right, now how long was it that Jane and Tommie showed up after Hawkins made the call?
A. Well, I don't know how long it was. It was just a short while, though.
Q. Well, can you estimate it to the jury, was it an hour or a half hour?
A. About half an hour, I guess.
Q. About a half hour. Then tell the jury what happened then, will you, Lola?
A. Well, I got in the car with them, and we started back towards town and we stopped at a restaurant, drank a cup of coffee, and then we rode back to the Corona Hotel.

Mr. Summers: I object to that, your Honor. The defendant wasn't present at that time.
[fol. 13] Mr. Froeb: Well, if the Court please——
The Court: She is just telling what they did. Overruled.

By Mr. Froeb:

Q. Now you say you went to the Corona Hotel, is that correct?

A. Yes.

Q. Now did you register in the Corona Hotel?

A. No.

Q. Now where did you stay in the Corona Hotel?

A. In the room with Jane.

Q. In a room with Jane?

A. Yes.

Q. Now can you tell us what happened while you were in that room?

A. Well, Tommie was in there with us for a little while but she went on into her room. She had a room there, too, and then me and Jane talked.

Q. All right.

The Court: Stand back so she can talk louder, Mr. Froeb.

By Mr. Froeb:

Q. Can you tell us what Jane did to you or can you tell us anything, give us any detail of what happened in Jane's room?

A. Well, she was just telling me how to act when I went into a room, how much to charge for dates, what kind of dates they was.

Q. Did Tommie do anything to you while you were in the room?

A. She arched my eyebrows is all.

Q. How long did you stay in Jane's room?

A. Well, the rest of the night.

Q. Well, how many hours was that, approximately?

A. I don't know. Probably five hours, five or six hours, something like that. I don't know.

Q. Then what did you do the next morning, Lola, can you tell us that?

A. Went over to the Bliss Hotel and registered.

Q. You went into the Bliss Hotel?

A. (Nods affirmatively.) Uh huh.

Q. And registered?

A. (Nods affirmatively.)

[fol. 14] Q. All right, now I take it you registered; let me ask you, did you register with the desk clerk?

A. Yes.

Q. Then after you registered with the desk clerk, what did you do?

A. Well, I talked with one of the porters and went up to my room.

Q. Do you know what his name was?

A. No.

Mr. Summers: I object to that, your Honor. It's after the transaction, the defendant was not present.

The Court: Overruled.

Mr. Froeb: I have a case directly in point on that.

The Court: Overruled.

By Mr. Froeb:

Q. You say you talked with one of the porters, is that right?

A. Yes.

Q. All right. Now did you go into a room?

A. Yes.

Q. What did you do while you were at the Bliss Hotel, will you tell the jury that?

A. Well, I filled a few dates there for a couple or three nights, just about two nights, I guess.

Q. Let me ask you, by "dates", you mean being a prostitute?

Mr. Summers: Your Honor please——

The Court: All right, let her tell what she means.

By Mr. Froeb:

Q. What do you mean by "dates"?

A. Well, it's a prostitute.

Q. Now were you arrested while you were at the Bliss?

A. Yes.

Q. What did you do when you got arrested?

A. Well, they took me up to the station.

Q. All right.

A. I didn't have any money so I called up the Corona Hotel. Jane wasn't there. I told the—the porter sent Tommie down.

Q. And what happened then? Did Tommie come down [fol. 15] to the station?

A. Yes.

Q. Did she pay your fine?

A. Yes.

Q. How much was the fine?

A. $25.00.

Q. Then what happened? Did you go back to the Bliss?

A. Yes.

Q. All right, did you fill any more dates while you were at the Bliss?

A. No.

Q. Now after—when did you leave the Bliss?

A. I think it was about the 28th.

Q. About the 28th of November?

A. Yes.

Q. All right. Now did you go any other place after you left the Bliss?

A. Yes, went down to the Ruby Rooms.

Q. Dixie Rooms?

A. Well, they are right there together.

Q. What's that?

A. They are right there together, it's the Ruby Rooms.

Q. Is that on First Street here in Tulsa?

A. Yes.

Q. Now what did you do when you went into the Dixie Rooms?

A. I worked there about one night, I guess, filled a couple of dates.

Q. You filled a couple of dates there. Then did you check out of the Dixie Rooms?

A. Yes.

Q. All right, how many days was this after you checked out of the Bliss that you checked out of the Dixie or Ruby Rooms?

A. I don't remember, just a day or two.

Q. A day or two?

A. I don't remember exactly.

Q. Did you leave Tulsa then?

A. Yes.

Q. All right, now let me ask you another question:

Before you went to the Bliss Hotel, did you go to the doctor here in Tulsa?

Mr. Summers: I object to that.

A. (The Witness) Yes.

Mr. Summers: Incompetent, irrelevant and immaterial.

Mr. Froeb: Your Honor please, it goes to prove intent and purpose of the trip.

The Court: Don't make remarks before the jury.

(There was a brief conference at the bench out of the hearing of the reporter and the jury.)

[fol. 16] The Court: All right, the objection will be overruled. Go ahead and answer. Can you talk a little louder, and don't nod your head. The reporter has to take your statement. It has to be in words.

By Mr. Froeb:

Q. Now my last question I asked you, Lola, was: Did you go to the doctor?

A. Yes.

Q. Now was that before you checked into the Bliss?

A. Yes.

Q. And were you examined by the doctor?

A. Yes.

Q. And what kind of an examination did he give you?

A. A blood test.

Q. All right, thank you. Now we will jump back now to where we were at the Dixie Rooms. You testified that you left the Dixie Rooms, is that correct?

A. Yes.

Q. Did you leave Tulsa then?

A. Yes.

Q. And that was, you testified, did you not, that that was approximately the 28th or 29th, is that correct, of November?

A. About the 29th.

Q. Where did you go from Tulsa?

A. Fort Smith.

Q. And who went with you?

A. Jane and Tommie.

Q. Now what kind of a car was it that you went in?

A. '55 Ford, convertible.

Q. Who did it belong to, who did the car belong to?

A. Well, I suppose it belonged to Jane.

Q. Now what happened when you got to Fort Smith, Arkansas?

Mr. Summers: Your Honor, I believe I'll object to this line. It's five or six days afterwards.

The Court: Well, overruled. Go ahead.

By Mr. Froeb:

Q. What happened when you got to Fort Smith?

A. Well, we stopped there and they called a hotel—they called a hotel there.

Q. Who did?

A. Well, I don't know which one called.

Q. Well, I know, but who made the call, was it Jane or Tommie?

A. I don't know which one made it.

[fol. 17] Q. Did you see either one of them make the call?

A. No.

Q. Do you know for a fact that they did call?

A. No, I wouldn't, I wouldn't say.

Q. Now this was after you got to Fort Smith?

A. Yes.

Q. Is that right?

A. Yes.

Q. Now did Hawkins show up soon thereafter?

A. Yes.

Q. How long after you got to Fort Smith did he show up?

A. The next day.

Q. And where did you see him in Fort Smith?

A. Outside of town.

Q. Outside of town?

A. Yes.

Q. Was it a cafe or filling station, or where was it?

A. Well, it was a cafe, a tavern.

Q. Now who was present when you saw Hawkins this next day, who was present in the group?

A. Jane and Tommie.

Q. Jane and Tommie?

A. Yes.

Q. And you and Hawkins, is that correct?

A. Yes.

Q. All right. Did you talk to Hawkins there, did you talk to him there at the cafe?

A. No.

Q. Was there a conversation there when you met at the cafe?

A. Well, I was going to leave Fort Smith and go back.

Q. Well, let me just go a little slower here.

The Court: Stand back so she will talk out.

By Mr. Froeb:

Q. You met at a cafe, you and Tommie and Jane Wilson, is that correct?

A. Yes.

Q. That's your testimony. And you were present there and Jane was there, Tommie was there, and that was where Hawkins met you, is that correct?

A. He was done (sic) there when we got there.

Q. He was there when you got there?

A. Yes.

Q. Now the next question I want to ask you is this: Was there a conversation when all four of you were present at the cafe?

A. No.

Q. Wasn't anything said at all?

A. Well, we talked. It wasn't anything I can remember.

[fol. 18] Q. All right, but you did have a conversation?

A. Yes.

Q. All right, now did you talk to Hawkins at all in the cafe?

A. Well, I might have, but I don't remember what I said to him.

Q. What was the next thing you did after you left the cafe?

A. Well, I left, I went back with him. Jane and Tommie went back, and I went on with Hawkins.

Q. Oh, you went on with Hawkins?

A. Yes.

Q. All right, where did you want to go?

A. Well, I didn't exactly know where I wanted to go. I don't know. I told him I hated to give it up, and so I was going to try it again, some.

Q. You said you hated to give it up?

A. I hated to give up, yes.

Q. And you'd try again?

A. Yes.

Q. Where did you go after you left Fort Smith? Where was the next stop?

A. Hot Springs.

Q. Hot Springs?

A. Uh huh.

Q. Now where did you stay at Hot Springs?

A. In the Jack Tarr Courts.

Q. Jack Tarr Courts?

A. (Nods affirmatively.)

Q. All right, did you spend the night with Hawkins there?

A. Yes.

Mr. Summers: Object to that, your Honor, incompetent, irrelevant and immaterial in this case, prejudicial.

The Court: Overruled.

By Mr. Froeb:

Q. All right, now, so you spent one night at the Jack Tarr Courts at Hot Springs, is that right?

A. Yes.

Q. Now did you visit any other hotel in Hot Springs, did you go to another hotel?

A. The next morning.

Q. The next morning?

A. Yes.

Q. All right, what hotel was that, Lola?

A. Valley Motel.

Q. Valley Motel?

A. (Nods affirmatively.)

Q. Why did you go there?

A. I was going to work there.

Q. You were going to go to work?
A. Yeah.
Q. Did you work there?
A. No.
[fol. 19] Q. Well, did you change your mind?
A. Yes.

Mr. Summers: Object to that as leading.

Q. All right, then did you register in the Valley Motel?
A. No.
Q. You didn't?
A. No.
Q. What did you do?
A. Well, I went in there, but——
Q. All right.
A. Then I left, and I went and called a taxi to the bus station, went to the bus station and caught a bus and went home, back to Mom and Dad.
Q. Did you have enough money to buy a bus ticket?
A. Yes, I had one cent left after I got the bus ticket.
Q. And you took the bus back home, is that right?
A. Yes.
Q. Now when you were up in Tulsa and you registered in the Bliss Hotel, did you use your—what name did you give them at the Bliss?
A. Johnnie McGuire.
Q. Johnnie McGuire. Now who suggested that name to you?

Mr. Summers: I object to that, your Honor.
The Court: Yes.
Mr. Froeb: All right, I'll withdraw the question, your Honor.

By Mr. Froeb:

Q. Where did you get that name from?
A. Well, he thought it up.
Q. He thought it up?
A. Yes.
Q. Who do you mean by "he"?
A. Hawk.
Q. Hawkins?

A. (Nods affirmatively.)

Q. The defendant here?

A. Yes.

Q. Was there any conversation between you and Hawkins regarding where you were going to stay when you came up to Tulsa, specifically?

A. Well, no, not that I remember of.

Mr. Froeb: All right, you may examine.

[fol. 20] Cross examination.

By Mr. Summers:

Q. This community where you live is down near Mena, Arkansas, isn't that right?

A. Well, it's in Oklahoma but it's close to Mena, yes.

Q. Across the line. The post office, I believe, is Cove, Arkansas?

A. There is a post office at Hatfield.

Q. Post office at Hatfield, you say?

A. Yes, there is.

Q. Prior to this time, you had had experience working in taverns, hadn't you?

A. In taverns, yes.

Q. Where had you worked in a tavern before?

A. At Dogpatch, at Nichols Place.

Q. Well, before that, had you worked at a tavern in Texas?

A. I haven't.

Q. What kind of work was it in Texas?

A. I worked at the cafeteria there at the Imperial Cafe.

Q. Where?

A. In Vernon, Texas.

Q. In Vernon, Texas. How long did you work there?

A. I don't know exactly how long it was, about a month.

Q. Then you came back to this community that you referred to as Dogpatch, across from Mena?

A. Yes.

Q. You say you worked in a tavern?

A. Yes.

Q. What were your duties, what did you do?

A. Well, I just worked behind the counter, selling beer.

Q. Who was the proprietor of that, what was his name?

A. Nichols.

Q. George Nichols?

A. Well, I know him as Ralph. I guess it's the same person.

Q. And then did you work for Mr. Hawkins at his place?

A. No.

Q. How long did you work at Mr. Nichols' place?

A. I don't know. I worked there two or three different times, just off and on.

Q. Then I believe you testified that you asked Mr. Hawkins about getting a better job?

A. Yes, I was talking to him about getting a different job, yes, I was.

Q. How many times did you talk to him about getting a job, do you know?

A. No.

Q. What did you say that he said about your getting a job in Tulsa, what was the language that you used a while [fol. 21] ago, what did he say?

A. I said, he said that I could work up there in Tulsa, wanted me to work up there in Tulsa with Jane.

Q. Did you know who Jane was?

A. Well, no, not exactly.

Q. You do now, don't you?

A. Yes, I do.

Q. She was his wife, separated from him, isn't that right; did you know about that?

A. I don't know anything about their personal life at all.

Q. Well, you came then to Tulsa?

A. Yes.

Q. From Oklahoma, through Mena, Arkansas?

A. Yes.

Q. Through Fort Smith?

A. Yes.

Q. And it was in the nighttime, I believe, when you got here?

A. Yes.

Q. Do you know where the filling station was that you testified about that you stopped?

A. No, I don't know where it's at.

Q. And then this woman that was known as Jane——

A. Yes.

Q. (Continuing) —and another one came?

A. Yes.

Q. And you left?

A. Yes.

Q. When was the next time you saw defendant Hawkins after that?

A. It was down at Fort Smith.

Q. How many days, would you say?

A. Well, I wouldn't say, because I don't know.

Q. Ten, was it ten days?

A. No, it wasn't ten days.

Q. It wasn't that long?

A. No.

Q. How long did you stay in Tulsa altogether, young lady?

A. Well, I got here about the 23rd, I think, and left about the 28th or 29th.

Q. You went to the Bliss Hotel, I believe—no, I believe you said that these two women took you to another hotel. What hotel was that?

A. Corona.

Q. Stayed all night?

A. Yes.

Q. And one of them prettied you up and straightened up your eyebrows?

A. Yes, Tommie did.

Q. Tommie did that. Now that's not uncommon practice for young ladies?

A. No.

Q. Nothing unusual about that. Good women have their eyebrows cleaned up just the same as bad women, isn't that right?

A. That's right.

Q. And then you went to another hotel?

A. Yes.

Q. Do you know which one of the women over there it [fol. 22] was that suggested that you go to another hotel?

A. No. I don't know whether I thought of it or they thought of it. I wouldn't say.

Q. To refresh your recollection, wasn't it Jane that suggested you go to another hotel?

A. Well, it might have been but I wouldn't say for sure.

Q. Now while you was at the Bliss Hotel, did you see Mr. Hawkins at all?

A. No.

Q. None of this time that you was in Tulsa after you left him at the filling station, did you see him, have any conversation with him until you saw him again in Fort Smith?

A. No, I didn't see him.

Q. Less then ten days afterwards?

A. No, I didn't.

Q. About how many dates do you think you filled in Tulsa, would you say?

A. Oh, I don't know, probably about three.

Q. Altogether?

A. (Nods affirmatively.)

Q. You got money for it, got money for those dates?

A. Yes.

Q. Did you ever give Mr. Hawkins any money?

A. No.

Q. Did you ever give Jane any money?

A. No.

Q. Did Mr. Hawkins ever suggest that you give him any money?

A. No.

Q. Did you ever give him any money for any purpose?

A. No.

Q. After you got back to Fort Smith and you wanted to go down to Hot Springs, I believe, do you know whether or not you had a conversation with Mr. Hawkins there about his wife hustling up here in Tulsa?

A. No.

Q. Do you remember such a conversation, remember giving him information?

A. About Jane?

Q. That Jane was plying the profession of prostitution in Tulsa?

A. You mean me telling him that Jane did?

Q. Yes, uh huh.

A. No.

Q. You are married, I believe?

A. Yes, I am.

Q. Where do you live?

A. Salem, Oregon.

Q. Is your husband here with you?

A. Yes.

Q. Did he discuss, when you were on your way up her that he was on his way to Oklahoma City about a busine deal?

A. Well, if he did I don't remember it.

[fol. 23] Q. You don't remember that?

A. No, seems like he said something about going Mississippi or somewhere. I don't remember.

Q. In other words, about going somewhere, Mississip was the way you understood it?

A. I don't remember. I wouldn't say for sure wher but——

Q. Didn't this occur: Didn't he tell you he was on h way to Oklahoma City, and was bringing you by Tulsa get a job with his wife?

A. No, he didn't. It didn't occur to me that he was goi to Oklahoma City, but he was bringing me up here.

Q. For his wife to get you a job?

A. Yes.

Q. She got you one, didn't she?

A. Yes.

Q. I believe you testified about spending the night dow in Arkansas?

A. Yes.

Q. With this defendant?

A. Yes.

Q. Did he give you any money for that?

A. No.

Q. Did he ever give you any money for any immor purpose?

A. No.

Q. I believe you said you never gave him any proceeds payment of your——

A. (Interposing) No, I didn't.

Q. (Continuing) —prostitution. Did you ever give an one, did you ever give any of these other women?

A. No.
Q. Did you give Jane any?
A. No.
Q. Or the other woman?
A. No.

Mr. Summers: That's all.

Redirect examination.

By Mr. Froeb:

Q. I have a few more questions, Lola: When you were at the Bliss did you not in fact receive a telephone call from Hawkins?
A. Yes.
Q. All right, and do you remember what was said in that telephone conversation?
A. He just asked me how I was getting along, and just nothing.
Q. Okay. Now do you know as a fact Jane and Tommie were prostitutes?
A. Well, I never had saw it.
Q. After you met them did you know that?
A. Yes.
Q. Now I want to ask you this question: Did you get married after this trip or before you made the trip?
[fol. 24] A. Did I—I got married afterwards.
Q. To Mr. Boyd?
A. Yes.
Q. Now you said you were born in 1938. Tell the jury how old you actually were at the time of this trip, that's November.
A. 17.

Mr. Summers: Your Honor please, that's repetition. He has gone over that.
The Court: I don't know. Overruled. Go ahead. Tell them how old you were.
The Witness: 17.

By Mr. Froeb:

Q. And when did your 18th birthday occur?

A. August 28th of this year.

Q. Of this year?

A. (Nods affirmatively.)

Q. One other question, Lola: Do you know whether this Nichols—you stated you worked for him, is that correct?

A. Yes.

Q. Do you know whether he's a good friend of Hawkins?

A. No, I don't know.

Q. I think I asked that before—have you ever seen them together?

A. Yes, just in the tavern together.

Q. I see. Did Nichols run this tavern that you worked at a few times?

A. Yes.

Q. And did Hawkins own the other tavern, did you work in the other tavern?

A. I never did work where Hawkins was.

Q. No, I'm asking you, if you know of your own knowledge, whether or not Hawkins ran the other tavern in Dogpatch?

A. Well, yes.

Q. And how many taverns are there in Dogpatch?

A. Two.

Q. Just two. In fact they are the only buildings there, aren't they?

A. All except a house.

Mr. Froeb: Okay, thank you.

The Court: All right, anything else, Mr. Summers? All right.

[fol. 25]

TOMMIE ALEXANDER, called as a witness on behalf of the plaintiff, testified:

Direct examination.

By Mr. Froeb:

Q. Will you state your name to the jury, please?

A. Tommie Alexander.

The Reporter: I'm sorry, I couldn't hear you.
The Witness: Tommie Alexander.

By Mr. Froeb:

Q. Do you live here in Tulsa?

The Court: Can you get back a little so that she will talk louder? Have to talk loud here, we have so much noise and confusion. You have to talk real loud. Go ahead.

By Mr. Froeb:

Q. Do you reside here in Tulsa now?
A. No, I live in Muskogee, Oklahoma.
Q. Were you in Tulsa during November, 1955?
A. Yes, sir.
Q. Where were you staying, Tommie?
A. The Corona Hotel.
Q. All right. Now did you know a person during November of 1955 by the name of Johnnie?
A. Johnnie, yes.
Q. All right, when did you first meet her?
A. When did I first meet her?
Q. Yes, just tell us in your own words.
A. Well, I don't remember the date. It was sometime in November.
Q. November of '55?
A. Uh huh.
Q. And where was it that you met her?
A. Where did I meet her?
Q. Uh huh.
A. I met her at the hotel.

The Court: Will you please stand back? She gets to talking soft and the jurors can't hear her.

[fol. 26] By Mr. Froeb:

Q. Can you tell us a little more specifically where it was you first met her?
A. Where I first saw her was at a service station.
Q. All right. Where was that, Tommie?
A. It was on the Sapulpa highway.

Q. And was it nighttime or daytime?

A. Well, I think it was about 3:00 or 4:00 in the morning.

Q. Can you tell us whether it was during, or the middle of November or towards the end of November, or when was it during November?

A. I don't remember.

Q. Can you give us your best recollection? Would you say it was after the middle of November?

A. It could have been.

Q. How was it that you happened to go out to a service station at 2:00 or 3:00 o'clock in the morning, would you tell the jury that?

A. Well, a friend of mine asked me to ride out with her.

Q. What was that friend's name?

A. Jane Wilson.

Q. Okay. She asked you to ride out there?

A. Yes, sir.

Q. And did she know how to get out to this service station?

A. Did she know how?

Q. Uh huh.

A. No, she didn't know the town too well. I used to live here, and I knew it.

Q. Well, did she ask anyone, did Jane ask anyone for directions as to how to get out there?

A. Did she ask anyone?

Q. Yes.

A. Me, she asked me. I mean, that's why she wanted me to go with her.

Q. Did she say why she was going out, why she wanted to go out to the service station?

Mr. Summers: Object to that, your Honor.

The Court: Sustain the objection.

By Mr. Froeb:

Q. Why was it that you went out to the service station?

A. Why did I go out there?

Q. (Nods affirmatively.)

[fol. 27] A. Because she asked me to go with her.

Q. All right, and did you go out there?

A. Yes, sir.

Q. And you testified that that's where you first saw this Johnnie McGuire, is that right?

A. Yes, sir.

Q. All right, tell us what happened while you were out there at that service station, will you?

A. What happened?

Q. Just describe to us what happened while you were out there.

A. Well, she got out of the car and came over to the car we were in and got in.

Q. Was there anybody else there besides Johnnie McGuire?

A. Jane was there.

Q. Who else was there?

A. Well, I don't know. There was someone in a car.

Q. Was it a man or a woman?

A. It was a man.

Q. All right, do you know what kind of a car it was?

A. I think it was a Cadillac.

Q. All right, do you remember anything else about it?

A. No, it was a light color.

Q. Do you remember, for instance, what the upholstery looked like?

A. No.

Q. Then what did you do after this Johnnie got in the car?

A. We went back to the hotel.

Q. Now whose car was that that you were driving?

A. It was Jane's.

Q. Jane's?

A. As far as I know.

Q. All right, now tell us, Tommie, what happened when you got back to the hotel.

A. What happened?

Q. Yeah.

A. Oh, we sat around and talked a little while and I went to bed.

Q. All right, what hotel was it?
A. Corona Hotel.
Q. All right. Are you a prostitute, Tommie?
A. I was. I have been.
Q. Were you during November of 1955?
A. Yes, sir.
Q. Was Jane a prostitute?
A. I don't know.
Q. Well, Tommie, do you know what relation Jane bears to the—all right, withdraw that. Do you know if Jane Wilson is married?
A. Do I know if she's married?
Q. (Nods affirmatively.)
A. I don't know for sure.
Q. Now did you do anything to this Johnnie McGuire while she was at the Corona that night?
A. Did I do anything?
[fol. 28] Q. Uh huh.
A. Yeah, arched her eyebrows.
Q. What was the purpose of doing that?
A. I don't know. They needed arching.
Q. Were you trying to make her more attractive?
A. No.
Q. Now did you leave the Corona Hotel around the end of November?
A. Did I leave?
Q. Yes, did you leave out of Tulsa?
A. I don't remember. It was, might have been in December, the first of December. I don't remember exactly.
Q. But you did leave Tulsa around that time?
A. Yes, sir, I did.
Q. And who was with you when you left Tulsa?
A. Who was with me?
Q. Yes.
A. Jane and this Johnnie.
Q. And did you leave Tulsa by car?
A. Yes, sir.
Q. Whose car was it?
A. It was Jane's.
Q. What kind of car is that again, Tommie?
A. Well, it's a Ford convertible.

Q. Do you remember the color?
A. I think it was green and white.
Q. Do you remember the year?
A. It was a new car.
Q. And where did you go when you left Tulsa?
A. Went to Fort Smith.
Q. After you got to Fort Smith—let me ask you this: How long did it take you to get to Fort Smith? Did you get there in a day, for instance, or two days?
A. Oh, took about three or four hours, I think.
Q. Three or four hours?
A. It's about 200 miles down there, isn't it?
Q. All right, now what happened when you got down to Fort Smith?
A. What happened?
Q. Yes, uh huh.
A. Well, I went to the Broadway Hotel and I rented me a room.
Q. You got a room?
A. Yes, sir.
Q. And when was, was that the last time you saw Johnnie McGuire?
A. Yes, sir.

Mr. Froeb: You may examine, Mr. Summers.
Mr. Summers: No questions.
The Court: All right, you may step down.
[fol. 29]

HAROLD SMITH, called as a witness on behalf of the plaintiff, testified:

Direct examination.

By Mr. Froeb:

Q. State your name again.
A. Harold Frederick Smith.
Q. Where do you work, Mr. Smith?
A. I'm extra waiter at the Country Club.
Q. Now during November of 1955, where did you work?
A. Corona Hotel.

Q. And what was your job there, Harold?
A. Clerk and porter.
Q. Porter?
A. Yes, sir.
Q. Did you know a woman named Jane Wilson?
A. Yes, sir.
Q. Drawing your attention to the latter part of November, 1955, did you receive a, did you have occasion to talk to Jane Wilson?
A. Yes, sir.
Q. All right, do you know what she asked you?

Mr. Summers: I object to that, your Honor.
The Court: Yes, sustained.
Mr. Summers: For the purpose of the record, I want to object, let me have a general objection to all this line of testimony.
The Court: All right.
Mr. Summers: I'll not make any further objections.
The Court: Well, of course I don't know how much of this line there is going to be. Any conversation out of the presence of the defendant is not admissible.

By Mr. Froeb:

Q. Do you know Tommie Alexander?
A. Yes, sir.
Q. Now this Jane Wilson and Tommie Alexander, do you know them to be prostitutes?
A. Yes, sir.

[fol. 30] Mr. Summers: I think that's incompetent.
The Court: Overruled. Go ahead. Do you know?
The Witness: Yes, sir.

By Mr. Froeb:

Q. Do you know them to be prostitutes?
A. I think so.
Q. Did they stay at the Corona Hotel during November of 1955?
A. Yes, sir.
Q. All right. Directing your attention to the latter

part of November, do you recall Jane and Tommie leaving the hotel late at night together?

A. It was in the morning.

Q. Well, all right, was it—tell us what time of morning it was.

A. Oh, 5:30, 6:00 o'clock, something like that.

Q. Could it have been 2:00 o'clock or 3:00 o'clock?

Mr. Summers: Wait a minute. I object to that.

The Court: Yes, sustained.

By Mr. Froeb:

Q. All right, now you do recall them leaving the hotel together early in the morning, or sometime during the morning, is that correct?

A. Yes.

Q. Do you recall that they came back with anyone?

A. Yes, sir.

Q. And do you know who that person was they came back with?

A. Yes, sir.

Q. What was her name?

A. Johnnie, I believe that's what she said her name was. I don't know.

Q. And your testimony is that they told you her name was Johnnie?

A. Yes, sir.

Mr. Summers: Object to that. He didn't testify to that.

The Court: Yes, what somebody told him would not be admissible, and ladies and gentlemen of the jury, you will not regard that testimony.

[fol. 31] By Mr. Froeb:

Q. You knew this girl's name to be Johnnie, did you?

A. Only what they said. I don't know what her name was.

Q. Did Johnnie check into the hotel?

A. No, sir.

Q. Where did she stay, Harold?

A. She visited with the girls a few hours. I don't know

where she, when she left I don't know where she stayed after that.

Q. Do I understand your testimony to be that she stayed——

Mr. Summers (Interposing): I object to that.

The Court: Sustained. Not what you understand.

By Mr. Froeb:

Q. Do you know where she stayed in the hotel, this Johnnie?

A. She didn't check in because I was on the desk.

Q. Did she stay in the hotel?

A. She visited those girls a few hours, she didn't check in the hotel.

Q. She visited with the girls?

A. Yes.

Q. She visited with those girls?

A. I got off duty at 8:00 o'clock.

Q. Do you know of your own knowledge that this Jane had received a telephone call at the Corona Hotel on this night that you testified about, prior to her leaving with Tommie?

A. Yes, sir, she did, because I answered the phone.

Q. What was that?

A. She received a call, because I answered the phone.

Q. You answered the phone?

A. Yes, sir.

Mr. Froeb: You may examine.

Mr. Summers: No questions.

The Court: All right, you may step aside.

[fol. 32]

L. V. Moudy, called as a witness on behalf of the plaintiff, testified:

Direct examination.

By Mr. Froeb:

Q. Will you state your name to the jury, please?

A. L. V. Moudy.

Q. And where do you live, Mr. Moudy?
A. My home is at Hatfield, Arkansas.
Q. And have you lived in the Beachland community?
A. Yes.
Q. Oklahoma?
A. Yes. That's where I live. Hatfield is just my address, see, out of Arkansas.
Q. How far is that from the Arkansas line?
A. About six miles, I would say, five or six.
Q. Do you have a daughter named Lola Fay Moudy?
A. Yes.
Q. Now directing your attention to the latter part of November of 1955, did your daughter take a trip on that occasion?
A. Yes.
Q. And do you know who it was she took the trip with?
A. I just know who she told me it was.
Q. And who was it?

Mr. Summers: Object to that.
The Court: Sustained.

By Mr. Froeb:

Q. Did you see a car outside of your house?
A. Yes.
Q. Do you know whose car that is?
A. All I know is what she told me.
Q. Well who, what is your understanding——

Mr. Summers: Wait a minute.
The Court: No, no, sustained, what his understanding is.

By Mr. Froeb:

Q. Will you describe the car to the jury?
[fol. 33] A. The best I could tell about it, it was a big car and light colored.
Q. Did you notice the upholstery on the car?
A. No, never noticed.
Q. Do you know what make of car it was?
A. Really I don't.

Q. It was a big car, though?
A. Yeah.
Q. Now did Lola get her clothes on that occasion?

Mr. Summers: Object to that as leading.
The Court: Yes, don't lead the witness.

By Mr. Froeb:

Q. What did your daughter do—let me start over: Was your daughter at the house when this car was outside?
A. Yes.
Q. All right, what was she there for?
A. She got her clothes.
Q. She got her clothes?
A. Uh huh.

Mr. Froeb: All right, you may examine.
Mr. Summers: No questions.
The Court: All right, you may step down.

SHERMAN HOLLOMAN, called as a witness on behalf of the plaintiff, testified:

Direct examination.

By Mr. Froeb:

Q. Will you state your name, please?
A. Sherman Holloman.
Q. Where do you live, Mr. Holloman?
A. I live in Mena, Arkansas.
Q. Mena, Arkansas?
A. Yes, sir.
Q. What do you do there?
A. I work in a service station.
Q. Do you know the defendant in this case, James C. Hawkins?
A. Well, I don't know how to answer that.
Q. What's that?
A. I don't know how to answer it. I think I know him, [fol. 34] I'm not sure.

Q. Well, do you see him in the court room this morning?

A. Well, I'm not sure.

Q. Now directing your attention to November of 1955, did you have occasion to repair a headlight on a car?

A. I did.

Q. And what kind of car was it?

A. It was a Cadillac.

Q. Cadillac, and do you remember anything else about this Cadillac?

A. Yes, sir.

Q. Would you tell the jury a little more about it?

A. Well, I was admiring the seat covers in it.

Q. Had orange seat covers?

A. No, sir, they was, I think they was leopard skin.

Q. Leopard skin?

A. Imitation leopard skin seat covers.

Q. Was there any name on the seat covers?

A. Yes, sir.

Q. What was it?

A. "Hawk".

Q. Now do you remember whether you repaired the headlight on this car during the middle of November or was it after the middle of November?

A. Well, I don't really know about that. I repair quite a few on cars there.

Q. Can you give us your best recollection on approximately when in November that was?

A. Well, I couldn't even swear it was in the month of November, to tell you the truth about it.

Q. Well, have you ever repaired a headlight on a car such as that before?

A. Yes, sir.

Q. On that particular car?

A. Not on that one, I have on a Cadillac.

Q. That's what I mean. Have you ever repaired the headlight on that car before?

A. Well, I don't think so.

Q. All right, have you ever repaired the headlight on that car since then?

A. No, sir.

Mr. Froeb: All right. Thank you very much. You may examine.

Mr. Summers: No questions.

[fol. 35]

ERMA LANE HAWKINS, called as a witness on behalf of the plaintiff, testified:

Direct examination.

By Mr. Froeb:

Q. Will you state your name to the jury, please?
A. The name you are using or my real name?
Q. Your present name.
A. Erma Lane Hawkins.

*****

Q. Have you ever used the name Jane Wilson?
A. Yes, sir.

Mr. Summers: May I ask a qualifying question?
The Court: Yes, sir.
Mr. Summers: You say your name is Erma Lane Hawkins?
The Witness: Yes, sir.
Mr. Summers: Are you married or single?
The Witness: I'm married.
Mr. Summers: What is your husband's name?
The Witness: James Hawkins.
Mr. Summers: That's this defendant?
The Witness: Yes.
Mr. Summers: When were you married?
The Witness: July 5, '54.
Mr. Summers: Have you ever been divorced?
The Witness: From him?
Mr. Summers: From him.
[fol. 36] The Witness: No, sir.
Mr. Summers: Still his wife?
The Witness: Yes.
Mr. Summers: Are you folks living together now as husband and wife?
The Witness: No.

Mr. Summers: How long have you been separated?
The Witness: Well, we've had a previous separation.
Mr. Summers: We object to her testimony.
Mr. Froeb: Your Honor please, I haven't asked her——
The Court: Go ahead. What are you going to ask, Mr. Froeb?

By Mr. Froeb:

Q. Have you used the name Jane Wilson before?

Mr. Summers: I object to any testimony, your Honor, because she is his wife.
The Court: You gentlemen approach the bench here.

(There is a brief discussion at the bench out of the hearing of the reporter and the jury.)

By Mr. Froeb:

Q. Now you testified that you are the wife of the defendant in this case, James C. Hawkins, is that right?
A. That's right.
Q. Now during November of 1955, did you also use the name Jane Wilson, or Wilma Jane Wilson?
A. When was that?
Q. During November of 1955, last year?
A. When I was here, I believe so.
[fol. 37] Q. All right. Now will you tell us whether or not you are a prostitute?

Mr. Summers: Object to that general question, your Honor.
The Court: All right, overruled.

A. (The Witness) When, now?

By Mr. Froeb:

Q. Are you a prostitute?
A. Not now.
Q. Were you during the month of November, 1955?
A. Yes.

Mr. Froeb: You may examine.

Cross examination.

By Mr. Summers:

Q. I believe you testified on former questions that you are not living with Mr. Hawkins at this time?

A. That's right.

Q. How long did you live with him?

A. It wasn't very long.

Q. During the time you lived with him, did you engage in prostitution?

A. No, sir, I did not.

Q. Did you ever given (sic) him information that you were engaged in prostitution?

A. No, sir, he did not know it.

Q. He didn't know it?

A. No.

Q. And last November, at the time of this transaction, were you living with your husband at that time?

A. No, sir.

Redirect examination.

By Mr. Froeb:

Q. If the Court please, I'd like to ask one question: Were you a prostitute before you met your husband?

A. I worked some, yes.

Mr. Froeb: Thank you very much.

Mr. Summers: No further questions.

[fol. 38] Roy Hunt, called as a witness on behalf of the plaintiff, testified:

Direct examination.

By Mr. Froeb:

Q. Will you state your name, please?

A. Roy Hunt.

Q. And where do you live, Mr. Hunt?

A. Bliss Hotel.

Q. What is your occupation?
A. Manager of the Bliss Hotel.
Q. And how long have you been employed in that occupation?
A. Five years.
Q. Five years. Were you so employed during November of 1955?
A. Yes, sir.
Q. At my request, in response to a subpoena duces tecum, did you bring a card with you?
A. Yes, I did.

(Plaintiff's Exhibit 1, being a card, was marked for identification.)

By Mr. Froeb:

Q. I hand you what has been marked for identification as Government's Exhibit No. 1, and ask you to tell the jury and the Court what that is.

Mr. Summers: Object to that until I see it.
The Court: Let him see it first, please, sir.
Mr. Summers: We object to it, incompetent, irrelevant and immaterial.
The Court: Overruled. Go ahead.

By Mr. Froeb:

Q. Will you tell the jury what that card is, if you know?
A. This is the original registration card of the Bliss Hotel. It is a form that is used for registering the guests on their arrival. It's a record of the date arriving and the number of days that they stay.
Q. And who is the guest shown on that card?
A. Johnnie McGuire, Duncan, Oklahoma.
[fol. 39] Q. And what is the check-in date on that card?
A. Registered November 24th at 5:45 p.m.
Q. What year is that?
A. 1955.
Q. When is the check-out date?
A. The check-out date was November 27th at 11:00 p.m., which would be the night of November the 27th.

OFFER IN EVIDENCE

Mr. Froeb: I offer the exhibit, Government's Exhibit No. 1.

The Court: All right, let it be admitted.

(Plaintiff's Exhibit 1 was received in evidence.)

Mr. Froeb: You may examine, Mr. Summers.

Cross examination.

By Mr. Summers:

Q. Do you know Johnnie McGuire?

A. No, I do not.

Q. Do you know whether Johnnie McGuire is a man or a woman?

A. No, I do not.

Mr. Summers: That's all.

Mr. Froeb: That's all.

The Court: Call your next.

Mr. Froeb: If the Court please, that's all of our evidence at this time. The government rests its case.

The Court: All right.

(The following out of the hearing of the jury)

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND OVERRULING THEREOF

Mr. Summers: Comes now the defendant at the close of the Government's testimony and moves the Court for a judgment of acquittal.

The Court: Overruled.

(The following again in the hearing of the jury)

[fol. 40] The Court: Call your first witness.

Mr. Summers: May I make a statement?

The Court: Yes, sir.

(Mr. Summers, on behalf of the defendant, makes the opening statement which he had reserved until this time.)

The Court: All right, call your first witness.

JAMES CLIFTON HAWKINS, the defendant, called as a witness in his own behalf, testified:

Direct examination.

By Mr. Summers:

Q. You are James Clifton Hawkins?
A. That's right.
Q. Defendant in this case?
A. That's right.
Q. How old are you?
A. 29.
Q. Where do you live?
A. I live in near Watson, Oklahoma, place called Dogpatch.
Q. What is your business?
A. I have one night club and one beer tavern, sir.
Q. Do you have any family?
A. Yes, sir, I do.
Q. What family do you have?
A. Two children, ex-wife.
Q. Not the woman that testified here on the witness stand?
A. No.
Q. What are the ages of the children?
A. 4 and 7.
Q. Boys or girls?
A. Both boys.
Q. Both boys?
A. Yes, sir.
Q. Do you know this girl, Lola, Lola Moudy at that time, now married, and I believe Lola Boyd?
A. Yes, sir, I know her.
Q. How long have you known her?
A. About a year, I'd say, altogether.
Q. Did you ever have any conversation with her about getting her a job anywhere?
A. Yes, sir, I have.
Q. Was she employed there in that community?
A. Had been working at a tavern there, I believe.
[fol. 41] Q. A tavern, at your tavern?
A. Not my tavern, no, sir.

Q. Whose tavern had she been working in?

A. Ralph Nichols'.

Q. What was the line of her duties there, if you know?

A. Well, serving beer.

Q. Did she have any conversation with you or make any request about a job?

A. Asked me could I get her a job where she might go to work.

Q. Did she ask you that once or more than once?

A. Well, several times.

Q. What did you tell her?

A. Well, two or three days I didn't tell her, didn't give her any answer to it. Then I had business in Oklahoma City, so I told her she could ride to Tulsa, might could work here, and I would contact my ex-wife for her.

Q. Why, what was the purpose of your bringing her to Tulsa?

A. For a job.

Q. Was your ex-wife here?

A. Yes, sir.

Q. I mean not the ex-wife, the wife, the woman that testified here; were you living with her at that time?

A. No, sir.

Q. How long had you been living apart?

A. Well, we never lived together much in two years' time.

Q. Did you know what her business was up there in Tulsa?

A. No, sir, not at the time, I didn't.

Q. Did you make any effort to find out?

A. Yes, sir.

Q. What effort did you make?

A. That's the main reason why I brought this girl up here, and got her, had my wife contact her, or her get in touch with my wife, so that I might find out if she was engaged in prostitution, since we were thinking about trying to make it again.

Q. Did you tell that young lady that you could get her a job of prostitution up here?

A. No, sir.

Q. Was that discussed with her at all?

A. No, sir.

Q. Did you find out later that your wife had been engaged in prostitution?

A. Yes, sir, I did.

Q. When did you find that out?

A. On the way from Fort Smith back.

Q. From whom did you find it out?

A. From Lola Fay Moudy.

Q. From Lola Fay Moudy. Did you ever discuss any money deals with her about any deals she had in Tulsa?

[fol. 42] A. No, sir, that wasn't my point in bringing her up here.

Q. Did she ever give you any money?

A. No, sir.

Q. Do you know whether she ever made any money or not?

A. I wouldn't know if she did or not.

Q. What was the purpose that you had when you came to Oklahoma, in addition to bringing her here?

A. Well, I was going to Oklahoma City.

Q. What for?

A. To pick up a deed to some property.

Mr. Summers: I ask that this be identified as Defendant's Exhibit 1.

(Defendant's Exhibit 1, being deed, was marked for identification.)

By Mr. Summers:

Q. I hand you Defendant's Exhibit 1 and ask you if you know what that is.

A. Yes, sir, this is the deed that I picked up in Oklahoma City.

Q. From whom did you pick it up?

A. Ralph Nichols.

Q. Had you had any business transactions with Ralph Nichols?

A. Bought this property from him.

Q. This deed is in your possession at this time?

A. Yes, sir.

Q. Where did you get it?

A. From George Ralph Nichols.

Q. Where?
A. Oklahoma City.

OFFER IN EVIDENCE

Mr. Summers: We offer this in evidence, your Honor.
The Court: Any objection?
Mr. Froeb: No objection.
The Court: All right, let it be admitted.

(Defendant's Exhibit 1 was received in evidence.)

By Mr. Summers:

Q. I note that deed is made to George Ralph Nichols.
A. Yes, sir, it is.
[fol. 43] Q. The makers, I believe the name is Johnson, is that right?
A. Yes, sir.
Q. Have you had any other deals with Johnson?
A. Yes, sir. I bought more property in the same block of land.
Q. It's really part of that, that two acres, is that right?
A. Yes, sir.
Q. Have you got the deed from Johnson?
A. No, sir, haven't got it yet.
Q. Why?
A. Payments aren't completed on the land.
Q. In other words, what was your arrangement with Johnson about that property that was made to Nichols, and the other property you had bought?
A. Nichols had never recorded his two acres, and in order to get me a deed on record, he tells me if I will pick this one up, he will make me one direct from him on the whole amount.
Q. Did you complete your transaction with George Nichols?
A. Yes, sir.
Q. How did you complete it?
A. I paid him the last $250.00 that I owed him, got the deed.
Q. Have you ever been convicted of any felony?
A. No, sir, I haven't.

Q. Have you ever served any term in any jail or penitentiary?

A. No, sir.

Mr. Summers: I'd like to offer this to the jury, your Honor.

The Court: All right.

Mr. Summers: You may take the witness.

Mr. Froeb: May I pass the Government's exhibit to the jury at this time?

The Court: Yes.

Cross examination.

By Mr. Froeb:

Q. How many prostitutes do you have working for you, Mr. Hawkins?

A. Not any.

Q. You state that you have a tavern down there at Dogpatch, is that right?

A. Yes, sir.

Q. And the other tavern is run by a man named Nichols?

[fol. 44] A. No, sir, not now.

Q. It was during November of 1955?

A. He had a tavern there, that's right.

Q. Is he a friend of yours?

A. Yes, sir.

Q. Know him pretty well?

A. Pretty good.

Q. As a matter of fact, didn't you come to Dogpatch at his insistence?

A. No.

Q. Did you come at his invitation?

A. No.

Q. How long have you been in Dogpatch, Mr. Hawkins?

A. Came there about June of last year, I believe.

Q. Why did you move to Dogpatch?

A. Had an opportunity to make a living.

Q. Doing what?

A. Running a tavern.

Q. Do you ever sell any leather goods, from Mexico, there?

A. Yes, sir.
Q. You do?
A. (Nods affirmatively.)
Q. Where did you live before you lived in Dogpatch?
A. Gregg County, Kilgore, Texas.
Q. Now you stated on direct examination that you never received any money orders from this ex-wife of yours, Jane Wilson, is that right?

Mr. Summers: I object to that. I didn't ask anything about any Jane Wilson.

Mr. Froeb: Excuse me, your Honor. I will withdraw that.

By Mr. Froeb:

Q. You testified on direct examination that you never received any money from Lola Fay Moudy or from Jane Wilson, your ex-wife, is that right?
A. I said Lola Fay Moudy, I believe.
Q. Did you ever receive any money from your ex-wife, Jane Wilson?
A. Maybe some she owed me.
Q. Do you remember getting a Western Union money order from her, last year, on November 19, 1955?
A. I wouldn't know what date, sir.
Q. Well, do you remember getting $150.00 Western Union money order during November of 1955 from Mrs. Jane Hawkins?
A. I wouldn't know how much it was.
Q. Do you recall getting a money order like that?
A. That's right.
[fol. 45] Q. What kind of a car were you driving during November of 1955?
A. Driving a '54 Cadillac coupe.
Q. Did it have leopard skin upholstery?
A. Yes, sir.
Q. Was your name "Hawk" written across the back of it?
A. Yes, sir.
Q. You still operate this bar down in Dogpatch?
A. Yes, sir.

Mr. Froeb: I believe that's all the questions I have.

Redirect examination.

By Mr. Summers:

Q. Counsel asked you about receiving some money from someone; from whom did you receive?

A. From my wife.

Q. All right, what was that for?

A. We had had trouble a short time before, and she taken some cash register money, but then she sent it back to me.

Q. I didn't understand that.

A. She took my cash register money, sir.

Q. You mean there at your place of business?

A. We had had trouble, yes, sir.

Q. How much did she take?

A. Well, around about $200.00, I believe.

Q. And what relation did this money that you received there through Western Union have to the money she taken out of your cash register?

A. Well, I just got in touch with her, told her I needed the money, you know, and she sent it back.

Q. Pay you back that debt?

A. Yes, sir.

Mr. Summers: That's all.

The Court: All right, anything further, Mr. Froeb? Any further questions?

Mr. Froeb: No, I have no further questions.

The Court: All right, you may step down.

[fol. 46] George Ralph Nichols, called as a witness on behalf of the defendant, testified:

Direct examination.

By Mr. Summers:

Q. What is your name?

A. George Ralph Nichols.

Q. Have you ever—do you live in Oklahoma, in Dogpatch now, or not—where do you live?

A. Well, I'm staying in Dallas, temporarily.

Q. Dallas, Texas?
A. Yes, sir.
Q. Have you ever had any business down at this place called Dogpatch, across the Arkansas line?
A. Yes, sir.
Q. What was that business?
A. Tavern.
Q. In November of 1955, where were you living?
A. In Dogpatch.
Q. Were you in Oklahoma City any of that time?
A. Yes, I was.
Q. I hand you a deed here that's been identified as Defendant's Exhibit 1, and ask you if you know anything about that deed.
A. Well, this is a deed that I got from Mr. Johnson on some property that I sold to Mr. Hawkins, and on the final payment this year, why then I give it to him.
Q. To whom?
A. To Mr. Hawkins. I never had had this recorded, and so I just signed it to him.
Q. That deed is made to you?
A. Yes, sir.
Q. What property is that?
A. Well, it's the property described here in McCurtain County, known as Blue Jeans Tavern now that Mr. Hawkins operates.
Q. I see, that's the tavern he operates?
A. Yes, sir.
Q. Now in November of last year, I'll ask you if he had any transaction with you, making any payments on that property?
A. Well, he paid his final payment.
Q. Where were you at that time?
A. Well, I was in Oklahoma City on Lincoln Boulevard, at Britton Road. My ex-wife operates a place there, and he came there and paid me my final payment.
Q. How much was that?
A. $250.00.
Q. All right. Then you had that deed at that time?
A. Yes, sir.
Q. What did you do with that deed?
A. I give it to him, to Mr. Hawkins.

[fol. 47] Mr. Summers: That's all.

Cross examination.

By Mr. Froeb:

Q. You've got a brother named Raymond Nichols?
A. Yes, sir.
Q. You've been married twice, haven't you?
A. Three times.
Q. Well, who was your first wife?
A. Her name was Natoma Cochran.
Q. Second wife named Gladys?
A. Gladys Naylor.
Q. You are presently married to Thelma Ginger Holcomb?
A. Right.
Q. Do you recall the summer of 1955 that you took a 14 year old girl named Carolyn——

Mr. Summers: Your Honor, I object to that.
The Court: Sustained.

By Mr. Froeb:

Q. Are you a gambler?

Mr. Summers: I object to that.
The Court: Overruled.

By Mr. Froeb:

Q. Are you a gambler?
A. Well, I have gambled some. I don't know, I wouldn't call myself a professional gambler.

Mr. Froeb: All right, thank you very much.

Redirect examination.

By Mr. Summers:

Q. Have you ever been convicted of a felony or served any term in a penitentiary?
A. Never.

Mr. Summers: That's all.
The Court: All right, step down.

[fol. 48] Mrs. James C. Hawkins, called as a witness on behalf of the defendant, having previously been duly sworn and testified as Erma Lane Hawkins, testified further:

Direct examination.

By Mr. Summers:

Q. You are Mrs. J. C. Hawkins that testified?
A. Yes, sir.
Q. It's been testified in evidence that this woman, this Moudy girl, that the night that she came to Tulsa and stayed with you and the woman named Tommie in her room, that you took her from that hotel over to the Bliss Hotel; is that right? Why did you do that?
A. Well, I'll tell you why, because she, my husband didn't know that I was working, and I wouldn't have gone and got the girl——

The Court: That isn't admissible. You could have objected to it. It isn't admissible why she took her. You will disregard that, gentlemen of the jury.
Mr. Summers: Very well. I'll ask another question.

By Mr. Summers:

Q. It has been testified by Mr. Hawkins that he received sometime in November between $100.00 and $200.00 from you.
A. That's right.
Q. Is that correct?
A. Yes, sir.
Q. What was that for?
A. Well, it's money that I took from the cash register when I left.

Mr. Froeb: I have no questions, your Honor.
The Court: All right, you may step down.

Mr. Summers: We rest, your Honor.
The Court: Do you have any rebuttal, Mr. Froeb?
Mr. Froeb: No rebuttal witnesses.

(The following out of the hearing of the jury)

[fol. 49]

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AND OVERRULING THEREOF

Mr. Summers: At the conclusion of all of the testimony, the defendant moves the Court for a judgment of acquittal.
The Court: Overruled.

*****

Filed June 4, 1957.

Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 52] [Caption omitted]

[fol. 53]

IN UNITED STATES COURT OF APPEALS

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
September 5, 1957

(omitted in printing)

[fol. 54]

IN UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5646—September Term, 1957

JAMES CLIFTON HAWKINS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma

OPINION—November 9, 1957

Cleon A. Summers for appellant.

Russell H. Smith, First Assistant, United States Attorney, (B. Hayden Crawford, United States Attorney, was with him on the brief) for appellee.

Before Bratton, Chief Judge, and Huxman and Breitenstein, Circuit Judges.

BRATTON, Chief Judge.

[fol. 55] The indictment in this case charged that appellant transported a girl in interstate commerce from Mena, Arkansas, to Tulsa, Oklahoma, for immoral purposes. The jury found appellant guilty; the court sentenced him to imprisonment; and he appealed.

Error is predicated upon the action of the court in permitting the wife of appellant to testify as a witness for the government. With certain exceptions which have no bearing here, it was the general rule at common law that neither husband nor wife was competent to give testimony as a witness for or against the other in any case, civil or criminal; and for a long period of time that rule was

consistently iterated, reiterated, and applied in the United States courts. Stein v. Bowman, 13 Pet. 209, 221; Lucas v. Brooks, 18 Wall. 436, 452; Stickney v. Stickney, 131 U.S. 227; Graves v. United States, 150 U.S. 118; Hendrix v. United States, 219 U.S. 79, 91; Jin Fuey Moy v. United States, 254 U.S. 189. But it later became the settled rule in the United States courts that the wife of a defendant on trial for a criminal offense is a competent witness in his behalf. Funk v. United States, 290 U.S. 371. That case did not involve and the court did not determine the question whether a wife is a competent witness against her [fol. 56] husband on the trial of a criminal case in which he is charged with an offense. But in Yoder v. United States, 80 F. (2d) 665, this court committed itself to the view that a wife is a competent witness to give testimony against her husband on the trial of a criminal case in which he is charged with a crime. There, the witness and the defendant had been divorced prior to the time of the trial but the court did not place its decision upon that basis. Instead, the court expressly placed its decision upon the underlying ground that a wife is a competent witness for the government in a criminal case in which her husband is being tried for a criminal offense; and we are content to follow that case without any effort to amplify or elucidate further its undergirding philosophy.

But let it be assumed for the moment that the witness was not competent to give testimony against her husband. Laying aside the testimony which the government elicited from the witness, these facts were established upon the trial. The prosecutrix, a girl seventeen years of age, lived with her parents near Dogpatch, Oklahoma, a place consisting of two buildings, one a tavern in which she worked as a waitress and the other a dance hall owned by appellant. In November, 1955, the prosecutrix told appellant that she wanted a better job which paid more money and [fol. 57] he asked her if she cared to go to Tulsa and work with Jane. She understood that he meant to work as a prostitute in a hotel, and she agreed to do so. The following day, they drove to Mena and thence to Tulsa in appellant's automobile. They stopped at a filling station on the outskirts of Tulsa along towards daylight, and appel-

lant made a telephone call. In about thirty minutes, Jane and a woman referred to as Tommie came to the filling station. The prosecutrix went with Jane and Tommie to Jane's room in a hotel where Jane gave the prosecutrix advice respecting practices in the trade. The prosecutrix then went to another hotel, registered, and worked as a prostitute for two days before being arrested. Tommie furnished the money with which to pay the fine imposed upon the prosecutrix. After the fine was paid, the prosecutrix went to another hotel or rooming house where she registered and spent a day or two; and while there, she filled a couple of dates. The prosecutrix, Jane, and Tommie then went to Fort Smith, Arkansas, in Jane's automobile. Appellant joined them in Fort Smith. Appellant and the prosecutrix then went to Hot Springs, Arkansas, where they spent the night together; and from Hot Springs, the prosecutrix went by bus back home. Jane's true name was [fol. 58] Erma Lane Hawkins and she was married to appellant. Though not divorced, at the time of the transportation of the prosecutrix and at the time of the trial appellant and his wife were not living together. He was living at Dogpatch and she was living in Tulsa. While in the course of so-called qualifying questions propounded by the attorney for appellant and in the course of cross examination, the wife of appellant gave other testimony, the substance of the testimony which the government elicited from her was that she had been a prostitute, and that in November, 1955, she used the name Jane Wilson. She did not testify at the instance of the government to any act or statement on the part of appellant relating to the transportation of the prosecutrix; did not testify that she ever saw appellant and the prosecutrix together at any time or place; did not testify that she ever saw the prosecutrix anywhere; did not testify that she ever saw appellant at Tulsa, at Fort Smith, or at Hot Springs; and did not testify to any act performed or any statement or admission made by him. Even though it be said that she was incompetent to testify as a witness against her husband, the error in permitting her to give the testimony which the government elicited from her was harmless and therefore does not require reversal of the judgment.

Affirmed.

[fol. 59]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—November 9, 1957

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that James Clifton Hawkins, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

(By order of November 21, 1957, the mandate of the United States Court of Appeals was stayed for a period of thirty days from November 19, 1957, under provision of paragraph 3 of rule 28.)

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 61]

SUPREME COURT OF THE UNITED STATES

No. 652, October Term, 1957

JAMES CLIFTON HAWKINS, Petitioner,

v.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—January 20, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 20

JAMES CLIFTON HAWKINS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH R. KING,
616 Peoples Bank Building,
Tyler, Texas,
Counsel for Petitioner.

December 2, 1957

WARLICK LAW, INC.— 1207 HORD STREET—DALLAS—RI 1-8711

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

JAMES CLIFTON HAWKINS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on November 9, 1957.

CITATIONS TO OPINIONS BELOW

The judgment and commitment of the United States District Court for the Northern District of Oklahoma

(R. 4)* is unreported and is printed in Appendix B hereto, infra, pages 9-10.

The judgment and sentence of the United States Court of Appeals for the Tenth Circuit (R. 8) is unreported and is printed in Appendix B hereto, infra, pages 10-11.

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 3-7) is unreported and is printed in Appendix B hereto, infra, pages 11-13.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 9, 1957 (R. 3-7), pages 10-11, infra. The jurisdiction of this Court is invoked under *28 U. S. C. Sec. 1254(1)* and *Federal Rules of Criminal Procedure, Rule 22(2)*.

QUESTION PRESENTED

Whether a wife is a competent witness against her husband who is charged with a criminal offense wherein no injuries to the wife are involved.

STATUTES INVOLVED

The statutory provisions and rules involved are: Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772,

*Footnote: *R.* refers to the transcript of record of the proceedings in the Court of Appeals for the Tenth Circuit. The numeral following R. refers to the page in such transcript and the numerals contained in the inner parenthesis refer to the pages of the transcript of record of the proceedings in the United States District Court for the Northern District of Oklahoma which was filed in the office of the Clerk of the United States Court of Appeals for the Tenth Circuit.

and *Federal Rules of Criminal Procedure, Rule 26.* They are printed in Appendix A, infra, pages 7-8.

STATEMENT

Petitioner was tried and convicted in the United States District Court of the Northern District of Oklahoma for a violation of the statute referred to as the Mann Act. [R. 1 (3)]. The jurisdiction of that Court was invoked by an indictment of the grand jury of such court [R. 1 (3)]. The evidence was that before the transportation of one Lola Fay Moudy in interstate commerce she had a conversation with Petitioner in which Petitioner asked her if she wanted to go up to Tulsa and work with Jane [R. 1 (8)]; and that she understood that working with Jane meant working as a prostitute [R. 1 (9)]. Erma Lane Hawkins called as a witness in behalf of the United States testified that she was married to the Petitioner and that she had never been divorced and, over the objection by Petitioner, Erma Lane Hawkins also testified that she used the name of Jane Wilson and was a prostitute during the month of November, 1955. [R. 1 (35-37)].

Petitioner appealed such judgment of conviction to the United States Court of Appeals for the Tenth Circuit and such Court affirmed such judgment stating that such Court had committed itself to the view that a wife is a competent witness against her husband on the trial of a criminal case in which he is charged with the crime and that if the wife were incompetent the above testimony by her which the United States elicited from her was harmless. (R. 3-7.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is in direct conflict with the decisions in *Brunner v. United States, 168 F. 2d 281 (6th Cir. 1948); United States v. Walker, 176 F. 2d 564 (2nd Cir. 1949), cert. den. 338 U. S. 891, 70 S. Ct. 239, 94 L. Ed. 547 (1949);* subsequent trial appealed on other grounds, *190 F. 2d 481 (2nd Cir. 1951), cert. den. 342 U. S. 868, 72 S. Ct. 109, 96 L. Ed. 653 (1951), reh. den. 342 U. S. 899, 72 S. Ct. 229, 96 L. Ed. 673 (1951);* motion to vacate judgment denied and affirmed, *197 F. 2d 287 (2nd Cir., 1952),* and *Paul v. United States, 79 F. 2d 561 (3rd Cir. 1935).*

In the instant case as in the *Brunner case, Walker case* and *Paul case,* one spouse was permitted in the trial court to testify against her husband or his wife in a criminal case wherein no personal injuries or harm to such husband or wife were involved and in all of these cases the different United States Courts of Appeals recognized the common law rule prohibiting one spouse from testifying against her husband in a criminal case. In the instant case the Court below preferred to hold contrary to such common law rule and in the *Bruner, Walker* and *Paul cases* the respective circuits preferred to follow the common law rule that the spouse is an incompent witness against the other spouse in a criminal case.

These decisions and their reasoning are in conflict and the language used in the opinions is so strong that it appears that this conflict will remain until resolved by this Court.

2. The decision of the Court below is believed to be in conflict with applicable decisions of this Court in the case of *Graves v. United States, 150 U. S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1893)*. In the *Graves case* the trial court allowed the prosecuting attorney to comment on the failure of the defendant's wife to testify. This Court in its decision said that the Defendant's wife was an incompetent witness and that by reason of such incompetency the comment was improper.

3. The Court below has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned departure by the trial court, as to call for an exercise of this Court's power of supervision in that, such decision is an admitted departure of the common law rule that a spouse is an incompetent witness against the other spouse in the trial of a criminal case, and is thereby contrary to *Rule 26, Federal Rules of Criminal Procedure*. In so holding the Court below followed the dictum of *Yoder v. United States, 80 F. 2d 665 (10th Cir. 1935)*. As pointed out by the Court below, the witness and defendant in the *Yoder case* were divorced at the time of the trial. Since divorce removed the incompetency at common law the decision in the *Yoder case* was in accord with the common law rule. However, the rationale of the Court in the *Yoder case* was in error and the statement that the *Yoder case* was a departure from the common law rule was in error.

In the *Brunner case*, supra, *Walker case*, supra, and *Paul case*, supra, the witnesses and defendants, respectively, were married at the time of the testifying. The testi-

mony in these cases were very strong to establish the guilt of the defendants. Mr. Justice Learned Hand summarizes the reason for the common law rules in *United States v. Walker*, (Page 568):

> "* * * because although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation the memory of what will ordinarily rankle as treachery."

Since the decision of the Court below is the first utterance of this doctrine this Court should either deny or confirm this departure from the common law rule.

This error cannot be termed harmless in that the testimony of the wife in the instant case was corroboratory and confirmatory in that the testimony of the United States' witness, Lola Fay Moudy, that she understood that the term "working with Jane" meant working as a prostitute was confirmed by the testimony of defendant's wife that she went by the name of Jane Wilson and that at the time of the offense that she was working as a prostitute.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH R. KING,
616 Peoples Bank Building,
Tyler, Texas,
Counsel for Petitioner.

December 2, 1957

APPENDIX A

Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772.

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the Territory of Alaska, the District of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedes or bail may be allowed.

"The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

"Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Federal Rules of Criminal Procedure, Rule 26.

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 12,849, Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

JAMES CLIFTON HAWKINS, Defendant

Judgement and Commitment

"On the 2nd day of October, 1956, came the attorney for the government and the defendant appeared in person and by counsel, Cleon A. Summers.

"It Was Adjudged that the defendant had been convicted upon his plea of not guilty and a verdict of guilty of the offense of having violated Title 18, U. S. C. 2421, as charged in the Indictment.

"It was Adjudged that the defendant was guilty as charged and convicted, and imposition of sentence was passed.

"Now, on this 28th day of November, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Cleon A. Summers. The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

"It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years.

"It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

W. R. Wallace
United States District Judge

"Approved as to form: Charles H. Froeb, Assistant U. S. Attorney

"Filed Nov. 28, 1956."

"UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5646—September Term, 1957

James Clifton Hawkins,

Appellant,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma

(November 9, 1957)

Judgment

"Forty-First Day, September Term, Saturday, November 9th, 1957.

"Before Honorable Sam G. Bratton, Chief Judge, and Honorable Walter A. Huxman and Honorable Jean S. Breitenstein, Circuit Judges.

"This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and was argued by counsel.

"On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

"It is further ordered by this court that James Clifton Hawkins, appellant, surrender himself to the custody of the United States Marshal for the Northern District of Oklahoma, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court."

OPINION

(November 9, 1957)

"Cleon A. Summers for appellant.

"Russell H. Smith, First Assistant, United States Attorney, (B. Hayden Crawford, United States Attorney, was with him on the brief) for appellee.

"Before BRATTON, Chief Judge, and HUXMAN and BREITENSTEIN, Circuit Judges.

"BRATTON, Chief Judge.

"The Indictment in this case charges that appellant transported a girl in interstate commerce from Mena, Arkansas, to Tulsa, Oklahoma, for immoral purposes. The jury found appellant guilty; the court sentenced him to imprisonment; and he appealed.

"Error is predicated upon the action of the court in permitting the wife of appellant to testify as a witness for the government. With certain exceptions which have no bearing here, it was the general rule at common law that neither husband nor wife was competent to give testimony as a witness for or against the other in any case, civil or criminal; and for a long period of time that rule was consistently iterated, reiterated, and applied in the United States courts. Stein v. Bowman, 13 Pet. 209, 221; Lucas v. Brooks, 18 Wall. 436, 452; Stickney v. Stickney, 131 U. S. 227; Graves v. United States, 150 U. S. 118; Hendrix v.

United States, 219 U. S. 79, 91; Jin Fuey Moy v. United States, 254 U. S. 189. But it later became a settled rule in the United States courts that the wife of a defendant on trial for a criminal offense is a competent witness in his behalf. Funk v. United States, 290 U. S. 371. That case did not involve and the court did not determine the question whether a wife is a competent witness against her husband on the trial of a criminal case in which he is charged with an offense. But in Yoder v. United States, 80 F. 2d 665, this court committed itself to the view that a wife is a competent witness to give testimony against her husband on the trial of a criminal case in which he is charged with a crime. There, the witness and the defendant had been divorced prior to the time of the trial but the court did not place its decision upon that basis. Instead, the court expressly placed its decision upon the underlying ground that a wife is a competent witness for the government in a criminal case in which her husband is being tried for a criminal offense; and we are content to follow that case without any effort to amplify or elucidate further its undergirding philosophy.

"But let it be assumed for the moment that the witness was not competent to give testimony against her husband. Laying aside the testimony which the government elicited from the witness, these facts were established upon the trial. The prosecutrix, a girl seventeen years of age, lived with her parents near Dogpatch, Oklahoma, a place consisting of two buildings, one a tavern in which she worked as a waitress and the other a dance hall owned by appellant. In November, 1955, the prosecutrix told appellant that she wanted a better job which paid more money and he asked her if she cared to go to Tulsa and work with Jane. She understood that he meant to work as a prostitute in a hotel, and she agreed to do so. The following day, they drove to Mena and thence to Tulsa in appellant's automobile. They stopped at a filling station on the outskirts of Tulsa along towards daylight, and appellant made a telephone call. In about thirty minutes, Jane and a woman referred to as Tommie came to the filling station. The

prosecutrix went with Jane and Tommie to Jane's room in a hotel where Jane gave the prosecutrix advice respecting practices in the trade. The prosecutrix then went to another hotel, registered, and worked as a prostitute for two days before being arrested. Tommie furnished the money with which to pay the fine imposed upon the prosecutrix. After the fine was paid, the prosecutrix went to another hotel or rooming house where she registered and spent a day or two; and while there, she filled a couple of dates. The prosecutrix, Jane, and Tommie then went to Fort Smith, Arkansas, in Jane's automobile. Appellant joined them in Fort Smith. Appellant and the prosecutrix then went to Hot Springs, Arkansas, where they spent the night together, and from Hot Springs, the prosecutrix went by bus back home. Jane's true name was Erma Lane Hawkins and she was married to appellant. Though not divorced, at the time of the transportation of the prosecutrix and at the time of the trial appellant and his wife were not living together. He was living at Dogpatch and she was living in Tulsa. While in the course of so-called qualifying questions propounded by the attorney for appellant and in the course of cross examination, the wife of appellant gave other testimony, the substance of the testimony which the government elicited from her was that she had been a prostitute, and that in November, 1955, she used the name Jane Wilson. She did not testify that she ever saw the prosecutrix anywhere; did not testify that she ever saw appellant at Tulsa, at Fort Smith or at Hot Springs; and did not testify to any act performed or any statement or admission made by him. Even though it be said that she was incompetent to testify as a witness against her husband, the error in permitting her to give the testimony which the government elicited from her was harmless and therefore does not require reversal of the judgment.

"AFFIRMED."

Office-Supreme Court, U.S.
FILED
AUG 22 1958
JAMES R. BROWNING, Clerk

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SUPREME COURT, U. S.

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 20

JAMES CLIFTON HAWKINS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

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August 19, 1958.

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 20

JAMES CLIFTON HAWKINS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 56-58)* is reported at 249 F. 2d 735.

JURISDICTION

The judgment of the Court of Appeals was entered November 9, 1957 (R. 59). A petition for a writ of cer-

*R. refers to transcript of record and the number following the page therein.

tiorari was filed December 9, 1957, and was granted January 20, 1958. The jurisdiction of this Court rests in 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED

1. Whether it was error to permit the Petitioner's wife to testify as a Government witness against Petitioner over the objection of Petitioner.

2. Whether the testimony of Petitioner's wife was prejudicial to Petitioner.

STATUTE AND RULE INVOLVED

The statutes and rules involved are: Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772; *Federal Rules of Criminal Procedure, Rule 26;* Act of May 24, 1949, c. 139, Sec. 110, 63 Stat. 108, 28 U. S. C. Sec. 2111; and *Federal Rules of Criminal Procedure, Rule 52(a).* They are printed in Appendix A, infra, pages 39 and 40.

STATEMENT

On October 2, 1956, the Petitioner was found guilty of having on or about November 23, 1955, knowingly transported Lola Faye Moudy in interstate commerce from Mena, Arkansas to Tulsa, Oklahoma, in the Northern Judicial District of Oklahoma, for immoral purposes (R. 2), and was so adjudged guilty and committed to custody for imprisonment for five (5) years (R. 3).

Omitting that part of the evidence offered to establish the interstate transportation, which was never questioned in the trial, the remaining evidence may be summarized as follows:

The girl transported, Lola Faye Moudy, for the Government, testified that she had worked in a beer tavern in Dogpatch, Oklahoma, near Petitioner's dance hall (R. 7-8); in November she made a trip to Tulsa with Petitioner (R. 7), telling Petitioner that she wanted to find a better job, make money, and Petitioner asked if she wanted to go to Tulsa and work with Jane Wilson (R. 8); that she understood that she was supposed to work in a hotel as a prostitute (R. 9); that upon arriving in Tulsa, Petitioner made a phone call and Jane Wilson and Tommie came down in about half an hour (R. 12-13); that she went to the Corona Hotel (R. 13), did not register there and stayed in the room with Jane (R. 14); that Tommie arched her eyebrows and went to her own room (R. 14); that Jane told her how to act, how much to charge for dates, what kind of dates they (sic) was (R. 14); that she registered in another hotel and engaged in prostitution (R. 14-15); that after being arrested, she went to another hotel and continued prostitution (R. 16); thereafter, she went with Jane and Tommie from Tulsa to Ft. Smith, Arkansas and there met Petitioner (R. 17-19); that she went from there to Hot Springs, spent the night with Petitioner, and went to a motel to work (R. 20); then changed her mind and returned to her home (R. 21); that she gave the name of Johnnie McGuire in registering in the hotel in Tulsa and

that Petitioner thought it up (R. 21); and that while she was in Tulsa, she received a telephone call from the Petitioner asking how she was getting along (R. 27).

Tommie Alexander, for the Government, testified that she was staying at the Corona Hotel during November, 1955, and met a person named Johnnie at the hotel (R. 29), first meeting her at a service station at about 3:00 or 4:00 o'clock in the morning (R. 29-30), going to the service station with Jane Wilson (R. 30) when Johnnie got out of a light colored Cadillac car with a man in it and got into Jane's car and they returned to the hotel (R. 31); that she was a prostitute during November, 1955 (R. 32); that at the hotel she arched Johnnie's eyebrows (R. 32); that she left Tulsa with Johnnie and Jane in Jane's car and went to Ft. Smith (R. 32-33) and there she rented a hotel room and saw Johnnie McGuire the last time (R. 33).

Harold Smith, for the Government, testified that during November, 1955, he worked at Corona Hotel as clerk and porter (R. 33-34); that he knew Jane Wilson and Tommie Alexander and knew them to be prostitutes and that they stayed at such hotel during November, 1955 (R. 34); that Jane and Tommie left the hotel early one morning in November and came back with a girl named Johnnie (R. 35) who didn't check in but visited those girls and that Jane had received a telephone call prior to leaving that morning (R. 36).

L. V. Moudy, for the Government, testified only to facts corroborating interstate transportation.

Sherman Holloman, for the Government, testified only to facts corroborating interstate transportation.

Roy Hunt, for the Government, testified he was manager of Bliss Hotel during November, 1955, and had and identified an original registration card of a guest, Johnnie McGuire registering November 24, 1955, and checking out November 27 (R. 43) and that he didn't know if Johnnie McGuire was a man or woman (R. 44).

Erma Lane Hawkins, for the Government, testified that she was the wife of Petitioner and had been since July 5, 1954; that she and Petitioner were separated; that she had used the name Jane Wilson during November, 1955; that she was a prostitute during November, 1955; that she was a prostitute before she met Petitioner (R. 40-42); and, on cross examination, that she did not engage in prostitution during time she lived with Petitioner; that he didn't know that she engaged in prostitution; and that she was separated from Petitioner in November, 1955 (R. 42).

James Clifton Hawkins, for the Petitioner, testified that Lola Moudy asked him if he could get her a job several times (R. 46); that Petitioner told her, he had business in Oklahoma City and that she could ride to Tulsa, might could work there and that he would contact his ex-wife (sic) for her (R. 46); that he and ex-wife (sic) had never lived together much and he didn't know what her business in Tulsa was (R. 46); that he had never discussed getting the young lady a job of prostitution (R. 46); that his purpose in going to Oklahoma City was to pick up a deed from

Ralph Nichols and that he did get the deed (R. 47); and, on cross examination, that he had received money from Mrs. Jane Hawkins (R. 50), and, on redirect, that such money was repayment of money she had taken from cash register (R. 51).

George Ralph Nichols, for the Petitioner, testified that in November, 1955, Petitioner had made in Oklahoma City a final payment on some property and he had given a deed to Petitioner (R. 52).

Erma Lane Hawkins, for the Petitioner, testified that she took money from cash register when she left and that was for what Petitioner received money from her (R. 54).

The Petitioner appealed on the ground that the trial court erred in permitting his wife to testify on behalf of the Government over the objection of the Petitioner (R. 1). The Court of Appeals for the Tenth Circuit affirmed the judgment of conviction, stating that it was committed to the view that a wife is a competent witness to give testimony against her husband on the trial of a criminal case in which he is charged with a crime (R. 57) and that, if such were error, the testimony which the Government elicited from her was harmless (R. 58).

SUMMARY OF ARGUMENT

Prior to 1933 the common law rule was that one spouse was incompetent to testify *for* or *against* the other spouse in the trial of a criminal case. The *reason* for the incompetency of one spouse to testify *for* the other was founded on

her *interest* in the case. The *reason* for the incompetency of one spouse to testify *against* the other was founded upon the desire to preserve domestic tranquillity and hold inviolate the confidences between husband and wife.

In 1933 the Supreme Court noted that the trend for 50 years had been toward allowing person with an interest to testify and that almost all the disqualification based on interest, was that of one spouse to testify for the other, had long since been abolished. The Supreme Court then, in the light of modern reason and experience removed this disqualification, thus allowing one spouse to testify for the other, but leaving untouched the rule of incompetency of one spouse to testify *against* the other.

In 1935 the Tenth Circuit Court inferred that likewise the trend was toward the abolition of the rule rendering incompetent one spouse to testify *against* the other, and advocated that it be abolished.

Whereupon Petitioner reviewed the American jurisdictions which review revealed that no such trend exists, but on the contrary showed that in only thirteen of fifty-two such jurisdictions reviewed, could one spouse be compelled to testify against the other in the trial of a criminal case.

The testimony of Petitioner's wife alone inferred that he had knowledge that his wife was a prostitute and was the person who received the girl transported in interstate commerce. Such testimony is a strong inference as to Petitioner's purpose and intent in such transportation, and had a substantial influence in the jury's determination of guilt.

The calling by the Government of Petitioner's wife, who would be privileged from testifying, to be sworn, was prejudicial to him in view of the inference that the failure to produce evidence by a witness infers that such witness' testimony is unfavorable to the accused. To rule that such calling, in itself, is not error would cause confusion in trials because of the record being encumbered by irrelevant testimony received under the "harmless error" rule.

To rule that such calling was error would prevent technical errors in that the overt act of such calling cannot be misinterpreted and would promote orderly procedure of trials.

ARGUMENT

I.

A Wife is Incompetent to Testify Against Her Husband on a Trial of a Criminal Case Wherein He Is the Accused.

The question here presented is of grave importance, because the opinion of the lower court in the case at bar stands alone, in an attempt to abolish a rule of long standing. The Tenth Circuit Court is the first and only United States Appellate Court to hold that a wife is competent to testify against her husband in the trial of a criminal case where he is the accused.

This Court cites as its only authority *Yoder v. U. S., 80 F. 2d 665 (10th Cir. 1935)*. This Court recognizing the *Yoder case* as its authority, simply saying: "* * * and we

are content to follow that case (Yoder) without any effort to amplify or elucidate further its undergirding philosophy." (R. 57.)

Since the Court gave no further reason for its decision, it can only be assumed that it adopted as its reasoning that of the Court in the *Yoder case*. A look at the *Yoder case* quickly reveals that the competency of the wife to testify against her husband was not before the Court, for in that case they were divorced at the time of the trial, which rendered the wife competent under the common law. In the *Yoder case*, the Tenth Circuit Court declared that, like her incompetency to testify *in her husband's behalf*, as decided in *Funk v. U. S., 290 U. S. 371*, a wife's incompetency to testify *against* him had become obsolete and should be abolished.

It follows then that the question which is now before this Court, concerning the competency of a wife to testify *against* her husband, is precisely the question which was before the court in *Funk v. U. S.*, supra, concerning the competency of the wife to testify *for* her husband, i.e., has the reasoning upon which the rule was established become obsolete to the point that it should be abolished?

The *Funk case* will be discussed more fully later in this brief, but suffice it to say at this point, that the Court in that case was prompted to remove the common law of incompetency of a wife to testify for her husband, mainly on the maxim that "No rule of common law could survive the reason on which it was founded." If then the common

law rule as to the competency of a wife to testify *for* her husband and the rule as to the competency of a wife to testify *against* her husband, were both founded upon the same reason the rule adopted in the *Funk case* should have decided both.

Such is not the case, however, as was recognized by the Court in the *Funk case*, quoting from the opinion of Mr. Justice Southerland, the opening statement which begins at page 373.

> "The sole inquiry to be made in this case is whether in a federal court the wife of the defendant on trial for a criminal offense is a competent witness in his behalf. *Her competency to testify against him is not involved.*"

A brief review of the history of each of these rules quickly reveals that not only were they not based on common reason, but were of different origin. *Geddis, Blackstone, Vol. 1, Chap. 15, note 443, page 347 (1):*

> "In criminal prosecution it is true that the wife may be indicted and punished separately, for the union is only a civil union, but in trials of any sort they are not allowed to be evidence for or against each other, partly because it is impossible for their testimony to be indifferent, but principally upon the unions of persons and therefore if they were admitted to be the witness *for* each other they would contradict one maxim of the law 'nemo in propria causa testis esse debet' and if *against* each other they would contradict another maxim 'nemo tenetur seipsum accussare'. (Emphasis added.)
>
> "* * * The best reason for not allowing a husband or wife to be expressly *against* each other is that if the wife is a witness *for* her husband she would be under

a strong temptation to commit perjury and if *against* her husband it would be contrary to the policy of the marriage and might create much domestic dissension and unhappiness so vice versa the husband." (Emphasis added.)

From the earliest history of our government the rules of common law, except as modified by the court, have prohibited the wife from giving testimony which would incriminate her husband. The rule is well stated in the early case of *John F. Stein v. William Bowman, 38 U. S. 209, 10 L. Ed. 129*, the Court in its opinion at page 221 said:

"In the case of *The Kind v. Cliviger*, 2 Tom. 268, the court held that a wife should not be called in any case to give evidence even tending to criminate her husband. Mr. Justice Gross in that case observed 'in all the books which treat of evidence there are certain technical rules laid down which are highly beneficial to the public and ought not to be departed from. Some of these relate to husband and wife, and we find the general rule as to them to be founded *not on ground of interest but of policy*, by which it is established that a wife shall not be called to give testimony in any degree to criminate her husband. And Lord Holt says that she shall not be called indirectly to criminate him. And the rule seems to have governed all decisions from that time to the present." (Emphasis added.)

This case, being in the nature of a civil case, we are not so much concerned with the facts as with the rule of law as recognized by the court. Quoting from the opinion as to the facts which are material to our point in question, the court at page 220 says:

"The Plaintiff having read the deposition of Frances Stuffle, Deceased, in evidence the Defendant called the wife of the deceased to prove, as stated in the bill of

exceptions, that her husband had been bribed by John Rist to give evidence in that case and also to prove that he had frequently told her that he knew nothing of the Plaintiff or of Nicholas Stone, deceased. The plaintiff objected to the swearing of the witness but the court overruled the objection and permitted the witness to give testimony. To this opinion the Plaintiff excepted."

It will be noted that in this case the wife was called upon to give two types of testimony, firstly, she was called upon to testify as to the participating of her husband in the commission of a crime, and, secondly, she was called upon to divulge matters which he had told her, yet the court in its opinion made no apparent distinction and in its ultimate decision excluded the testimony, both types, apparently recognizing that they were both founded upon the same principle. The Court further said, at page 222:

"The law does not seem to be entirely settled how far in a collateral case a wife may be examined on matters in which her husband may be eventually interested. Nor, whether in such a case she may not be asked questions as to facts that may in some measure tend to criminate her husband but which afford no foundation for prosecution. The decisions which have been made upon these points seem to have been influenced by the circumstances of each case and they are somewhat contradictory. It is, however, admitted in all the cases that the wife is not competent except in cases of violence upon her person directly to criminate her husband; or to disclose that which she has learned from him in their confidential relationship.

"Some colour is found in some of the elementary works for the suggestion that this rule being founded upon the confidential relations of the parties will protect either from the necessity of disclosure; but will not prohibit either from voluntarily making any dis-

closure of any matters received in confidence and the wife and the husband have been viewed in this respect as having a right to protection from a disclosure on the same principle as an attorney is protected from the disclosure of a fact communicated to him by his client.

"The rule which protects an attorney in such case is founded on public policy and may be essential to the administration of justice. But this privilege is the privilege of the client and not of the attorney. The rule which protects the domestic relations from exposure rests upon considerations connected with the peace of the families."

and at page 223:

"In the present case the witness was called to discredit her husband; to prove in fact that he had committed perjury; and the establishment of the fact depended on his own confessions. Confessions which if ever made were made under confidence that subsists between husband and wife. It is true that the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule.

"Can the wife under such circumstances either voluntarily be permitted, or by force of authority, be compelled to state facts in evidence which render infamous the character of her husband. We think most clearly that she cannot be. Public policy and established principles forbid it.

"This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations which constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To breakdown or impair the

> great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence."

At page 223, the Court concluded:

> "We think the court erred in overruling the objections to this witness."

From the authorities just cited it is clear that the incompetency of the wife to testify *for* her husband and the incompetency of the wife to testify *against* her husband are two separate and distinct rules and are each founded upon separate principles of reason.

The rule as to the incompetency of the wife to testify *for* her husband was based on her interest in the case, while the rule as to the incompetency of the wife to testify *against* her husband was based on preserving domestic tranquillity and holding inviolate the relationship between man and wife.

Having thus developed that each of these rules, though often stated together prior to the *Funk case*, are based on separate reasons, it should not be necessary to look back of *Graves v. U. S., 150 U. S. 118*, decided by the Supreme Court November 6, 1893. In the case at bar quoting from the opinion of Chief Justice Bratton (R. 56-57):

> "With certain exceptions which have no bearing here, it was the general rule at common law that neither husband nor wife were competent to testify as a witness for or against the other in any case, civil or criminal; and for a long time that rule was consistently iterated, reiterated and applied in the United States courts. *Stein v. Bowman*, 13 Pet. 209, 221;

Lucas v. Brooks, 18 Wall. 436, 452; *Stickme v. Stickme*, 131 U. S. 227; *Graves v. U. S.*, 150 U. S. 118; *Hendricks v. U. S.*, 219 U. S. 79, 91; *Jin Fuey Moy v. U. S.*, 254 U. S. 189."

The *Graves case* thus stands as the last utterance by the Supreme Court as to the incompetency of a wife to testify *against* her husband. The wisdom of the common law rule that a wife was not competent to testify either for or against her husband, as reiterated by the Supreme Court in the *Graves case*, was not seriously challenged until the Supreme Court decided *Funk v. U. S., 290 U. S. 371*, in December 1933.

In the *Funk case*, however, as was pointed out above, only the rule as to the incompetency of the wife to testify *for* her husband was involved.

In the *Funk case*, the Petitioner was twice tried and convicted in Federal District Court upon indictment for conspiracy to violate the prohibition law. His conviction on the first trial was reversed by the Circuit Court of Appeals on the ground not material here. *46 F. 2d 417*. Upon the second trial, as upon the first, defendant called his wife to testify in his behalf. At both trials she was excluded upon the ground of incompetency. The Circuit Court of Appeals sustained this ruling upon the first appeal and also upon the appeal which followed in the second trial. *66 F. 2d 70*. Error was predicated on the failure of the court to allow the wife to testify in behalf of her husband, thus a direct attack was made on the rule rendering a wife to be incompetent to testify *for* her husband because of her

interest in the case. The Supreme Court then, in an exhaustive review of the history and reasons upon which rested the laws of competency of witness, noted changes which had been brought about partially by legislation and partially by judicial construction.

The Court in its opinion, at page 376, quoted from the opinion in *Benson v. U. S., 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991*, the following:

> "Indeed the theory of the common law was to admit to the witness stand only those presumable honest appreciating the sanctity of an oath unaffected as a party by the result and free from any temptations of interest. The courts were afraid to trust the intelligence of jurors. *But the last 50 years have wrought a change in these respects and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witnesses those matters which heretofore rules sufficient to justify his exclusion.*" (Emphasis added.)

At page 380:

> "*The rules of the common law which disqualified as witnesses persons having an interest long since in the main have been abolished*, both in England and in this country; and what was once regarded as sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its affect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused

> of crime gradually came into force after the middle of the last century and it is today universally accepted. The exclusion of the husband or wife is said by this Court to be based upon his or her interest in the event. *Jin Fuey Moy v. U. S.*, supra, and whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of marital relationship makes little difference. In either case a refusal to permit a wife, upon the ground of interest, to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity." (Emphasis added.)

The Court having thus concluded that because of legislation, judicial decisions and other changes brought about by modern experience, the reason upon which this rule was based no longer existed and said on page 386 of the *Benson case:*

> "It results from the foregoing that the decision of the court below in holding the wife incompetent is erroneous."

At this point there was established a new rule, rendering competent the testimony of the wife in behalf of her husband, but leaving untouched and as yet unchallenged, the rule rendering a wife incompetent to testify *against* her husband. As was pointed out earlier in this brief, the problem which confronts this case concerning the common law rule which renders incompetent the wife to testify *against* her husband is precisely the question which was before the *Funk case* concerning the competency of the wife to testify *for* her husband, .ie., as the reason upon which this rule was based, become obsolete to the point that it should be abolished?

Can it be said that the reason upon which the rule rendering incompetent the testimony of a wife *against* her husband, i.e., to preserve domestic tranquillity, no longer exists? Are these reasons not just as important now as ever?

Yoder v. U. S., 80 F. 2d 665, was decided by the Tenth Circuit Court of Appeals in 1935, two years after the decision in the *Funk case*. This was the first attack by a Federal Appellate Court upon the common law rule rendering the wife incompetent to testify *against* her husband. In this case, Roy Yoder was convicted of transporting a female in interstate commerce for immoral purposes. The only principle of error assigned, to be here considered, may be taken from the opinion, at page 667, to-wit:

> "1. One concerns the admissibility against Yoder of Testimony of his divorced wife. Yoder testified that he and Mrs. Young left for Chicago for his home and that both of them talked to Yoder's wife about the trip. In rebuttal the Government called Mrs. Yoder, who divorced Yoder after the Chicago trip and before the trial, and over seasonable objection and exception she testified that she was not at home the day her husband and Mrs. Young left for Chicago; that she was in Seminole; that she did not know Mrs. Young; that when she returned from Seminole she found a note from her husband written on a large cardboard that he had gone to Blackwell; that after the divorce Yoder asked her to corroborate his testimony by false swearing.
>
> "We are of the opinion that this testimony was rightly admitted. Until 1933 spouses were incompetent witnesses in criminal cases in Federal courts. But in that year, in *Funk v. U. S.*, 290 U. S. 371, the subject

of evidence in criminal cases was exhaustively reviewed and the Court held that the rules of evidence were not restricted to local rules in force at the time of the admission into the union of the state where the trial took place but were governed by common law principles as interpreted by the Federal courts in the light of reason and experience. It was there held that a wife is a competent witness for her husband. Whether she is a competent witness against him was reserved, and has not been authoritatively decided.

"* * * A wife is now competent to testify for her husband; the question still remains, may she testify against him? In this case she was divorced when she testified and there may well be a distinction on that ground. We prefer, however, to rest our decision on the underlying question whether a wife is incompetent as a witness when called by the prosecution."

The Court in its opinion thereafter set out a brief summation or analysis of some state statutes, citing Dean Wigmore in 1923, Sec. 488, which the Petitioner does not feel constrained to set out in this brief, since a recent and exhaustive study of all the states have been made and will be set out in this brief later.

The Court then continued, saying at page 668:

"These statutes and the decisions of many courts which might be cited indicate a clear and decided trend toward removing the bar of incompetency from witnesses as such; *that we are moving steddily in the direction of allowing the trier of the facts to hear all of the evidence, the interest or the relationship of the witness to the party being given due consideration in weighing its value.* The trend is in the right direction for we can see no reason why Mrs. Yoder should not testify that she was in Seminole and not in Shawnee on a certain day and that she did not know Mrs.

Young; nor can we see any reason why Yoder, who testified to the contrary, should have the privilege of excluding her testimony." (Emphasis added.)

"(2). Her testimony of communication between her and Yoder after the divorce are not privileged because they were not husband and wife. Mrs. Yoder's testimony however did not stop there. She testified as to a written communication between her and her husband during their marriage. Competency of this testimony involves very different considerations from those concerning her competency as a witness. *The wisdom of the common law rules that held inviolate the confidence of a penitent and his priest, a patient in his physician, a client in his lawyer and a husband in his wife, has stood the test through time.* The statutes of 42 jurisdictions provide that private communication between husband and wife are incompetent evidence and in 26 of these it is expressly provided that they are incompetent during marriage and afterward. Such is the rule in the Federal courts. *Hopkins v. Grimshaw*, 165 U. S. 342, 17 S. Ct. 401, 41 L. Ed. 739." (Emphasis added.)

Two things of particular significance must be here pointed out. (1) The quote from the Court expressing the reason for their decision on this point, taken from page 668 of the *Yoder case*,

> *"That we are moving steadily in the direction of allowing the trier of the facts to her all the evidence, the interest or relationship of the witness to the party being given due consideration in weighing its value."*

is exactly what prompted the Court in the *Funk case*, in dealing with the wife as a witness *for* her husband, wherein interest was the reason for the incompetency. There the Court found that the trend was toward allowing interested testimony and considering the interest only in determining

the weight to be given the testimony. But it must be pointed out that such has not been the trend toward the rule here in question, which was based upon the reason of preserving domestic tranquillity. For to admit such testimony at all is to violate the reason upon which the rule rests, not withstanding what weight would be given it by a "trier of the facts."

The second significant point which must be noted from the opinion, is the apparent approval of the common law of incompetency of one spouse to testify as to confidential communication received during marriage, as is made evident on page 668 of the *Yoder case* wherein the Court said:

> *"The wisdom of the common law rules that held inviolate the confidence of a penitent in his priest, a patient in his physician, a client in his lawyer, and a husband in his wife, has stood the test of time."*

The position of the Court seems then to be inconsistent for it has been shown that both the common law rule, as to the incompetency of one spouse to testify as to confidential communication received during marriage, and the incompetency of the wife to testify against her husband, are both founded upon the same reason, i.e., to preserve domestic tranquillity and hold inviolate the relationship between man and wife.

The Petitioner submits then, that to recognize the wisdom of the one, is to confirm the wisdom of the other.

After the decision in the *Funk case* and just two months prior to the decision in the *Yoder case*, the Third Circuit decided *Paul v. U. S., 79 F. 2d 561.* In this case, two

defendants were jointly indicted, one was Paul, the other was Mrs. Reid, the wife of Norman Castle Reid. The evidence showed that the Reids, though still married, had been separated for four or five years. The defendants were charged with forgery and with uttering a forged instrument. The instrument involved in this case was a government check payable to the order of Norman Castle Reid. The question in this case was who endorsed the check. The evidence showed that both Paul and Mrs. Reid participated in the cashing of the check, and Mrs. Reid testified that the endorsement was that of her husband. He was called as a witness for the Government and he testified that he had not endorsed the check. On the trial, Mrs. Reid was acquitted on both counts and Paul was acquitted of forgery but convicted of uttering a forged instrument. Error was urged in permitting Norman Castle Reid to testify, over objection, *against* his wife and Paul. The Court said at page 563,

> "At common law the rule is well settled that a husband was not allowed to testify for or against his wife and in Pennsylvania this rule has been followed ever since the case of *Commonwealth v. Manson*, 1 Ashem. (Pa. 31). This rule has been followed in the Federal courts until recently when it was relaxed in an exhaustive opinion by Mr. Justice Southerland to permit a wife to testify for her husband, *John S. Funk v. U. S.*, 290 U. S. 371, 548 S. Ct. 212, 78 L. Ed. 369, 93 ALR 1136; but this rule has not been so relaxed as to permit a husband to testify against his wife. The rule extends to testimony in which the wife is being jointly tried with a co-defendant. *United States v. Liddy* (D. C.), 2 F. 2d 60. The learned court accordingly fell into error in permitting Norman Castle Reid

to testify against his wife and Paul. His testimony was very damaging, for without it there was no evidence whatever that his name had been forged."

Brunner v. U. S., 168 F. 2d 281, was decided in 1948 in the Sixth Circuit. Here the defendant was convicted of fraud in obtaining a registered letter and for abstracting and removing $40.00 from the letter. The wife was permitted to testify *against* the husband. The Court in its opinion discussed the history of the common law rule, cited the *Funk case*, cited *Rule 26, Federal Rules of Criminal Procedure*, which grew out of the *Funk case*, and then said at page 283:

> "But in 1893, or forty years before the *Funk* case, the Supreme Court said in *Graves v. United States*, 150 U. S. 118, 121, 14 S. Ct. 40, 37 L. Ed. 1021 (a criminal case), that the wife was not a competent witness against her husband. See also *United States v. Jones* (D. C.), 32 Fed. 569, and in *Paul v. United States*, 3 cir., 79 Fed. 2d 561, 563, the Court held that it was error to permit the husband to testify against his wife and another indicted with her."

The Court then recognized the decision in the *Yoder case*, and commented upon the conflicting opinion of the two Circuit Courts in the *Paul* and *Yoder cases*, and disposed of the question by saying, at page 283:

> "Our view is that we must accept the opinion of the Supreme Court in the Graves case as a correct interpretation of the law. It may be that 'in the light of reason and experience' the Supreme Court will find it desirable to remove the incompetency of a wife as a witness in a criminal case against her husband, but it has not yet done so."

The last case to be decided on this point was the *United States v. Walker, 176 F. 2d 564*, decided by the Second Circuit Court July 29, 1949. Here the defendant was convicted of transporting sums of money taken feloniously by fraud and with intent to steal and purloin. The evidence showed that the defendant persuaded a woman to go through a marriage ceremony with him, pretending to marry her. Later he managed to get money from her and transported it from Texas to New York. The evidence further revealed that the defendant had done the same thing to at least two other women, previously. However, the first victim actually became his wife and was at the time of the trial, even though she had filed for a divorce. The defendant's wife was permitted to testify over the objection of the defendant. The Court in deciding this case said at pages 567, 568:

> "The fifth and last alleged error was the admission of the testimony of the defendant's wife, Clara Duerr Walker. Nobody disputes that, although there were some exceptions, at common-law a wife's testimony against her husband was incompetent. The only question is whether that doctrine has been changed; and, if not, whether the case at bar is within any exception. In deciding this we must bear in mind two distinct principles: (1) the incompetency of either spouse to testify against the other; (2) the incompetence of either spouse to testify to confidential communications made during marriage. Clara Duerr Walker testified to what the defendant said to her, while courting her before their marriage on June 8, 1945; and she also testified to what he told her thereafter, which,

provided it was 'confidential,' was incompetent on any theory, and indeed would have been even after a divorce. Although no part of what he told her after marriage can be considered as a confidential communication except a letter which he sent her on March 24, 1947, that was, not only 'confidential', but extremely damaging. He had shipped her off to live in Alaska, and had left her substantially without money; he had gone through the form of marrying two other women meanwhile, and he was still living with the second of these, preparing to fleece her, as he had fleeced her predecessors. Surely nothing was better calculated to arouse the detestation of the jury than the letter, with its protestations of continued love and its assurances that he was only awaiting the opportunity to be reunited with her. We should find it extremely difficult to write off the admission of this letter as 'harmless error' under Rule 52(a), even in a case where the guilt of the accused was so incontestably proved as here. It is true that, when it was offered, the defendant said that he had no objection to its receipt but that must be read in conjunction with his objection at the outset to any testimony whatever of this witness. His assent to the letter only meant that he had no specific objection to it as distinct from his general objection to any of her testimony.

"We need not say, however, whether we should have held that its admission was alone enough to compel a reversal of the judgment, because we hold that no part of the testimony of the witness was admissible anyway; and that for that reason the judgment cannot stand. In Yoder v. United States the Tenth Circuit declared that, like her incompetence to testify in her husband's behalf, a wife's incompetence to testify against him had become obsolete and should be abolished; but they did not have to decide the point, because the wife had in fact been divorced, and that made her testimony competent under the old law. A few months later the Third Circuit held the contrary

of this dictum, and the Sixth Circuit made the same ruling only a year ago. Thus, the question is still open in point of authority. It is always a debatable question how far any relevant evidence should be privileged. It deprives the party against whom the privilege is invoked of access to the truth; and in a disclosure of the whole truth should be the prime concern of a court of justice. Whether in a given situation the interest of the privileged party in suppressing the truth, ought to outweigh that concern would seem to be a matter for Congress, and not for the courts. Moreover, unlike the spouse's disqualification as such this conflict of interest is by no means one-sided, because, although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation than the memory of what will ordinarily rankle as treachery. Nor is it either practicable or desirable to make the decision dependent upon the judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save. That was true, no doubt, here; but we must look beyond the case before us. The question will always arise in the progress of the trial; it must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously. The common-law avoided such an inquiry by taking divorce as the only test; and, while the privilege persists at all, there is every reason so to limit the exception. We conclude, therefore that we should await the choice of Congress between the conflicting involved, or such an overwhelming general acceptance by the states of abolition of the privilege, as induced the Supreme Court to action in Funk v. United States, supra."

Recognizing from both the *Funk case* and the *Walker case* the importance of noting how other jurisdictions have treated the rule here in question, a review was made of all

the forty-eight states, the District of Columbia, Phillipine Islands, Alaska and Hawaii.[1]

Bearing in mind what prompted the Court in the *Funk case* to abolish the rule of incompetency of one spouse to testify *for* the other, was their finding that because legislative changes and judicial construction revealed that the trend was toward the abilition of all rules rendering incom-

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[1] *Code of Alabama* 1940, Title 15, Sec. 311 (5639); *Alaska Rev. Stat.* 1934, Sec. 4309; *Arizona Revised Statutes Annotated Criminal Code*, Vol. 5, Sec. 13-1802; *Arkansas Statutes* 1947, Title 43, Sec. 2019; *California Code of Civil Procedure*, Sec. 1881; *Colorado Revised Statutes* 1953; Chap. 153, Art. 1, Sec. 7; *General Statutes of Connecticut*, Revision of 1949, Chap. 429, Sec. 8800; *Delaware Code*, Sec. 3502 (1953); *District of Columbia Code*, 1951 Edition, Title 14, Sec. 306; *Florida Statutes* 1957, Chap. 90, Sec. 04(90.04); *Georgia Code Annotated*, Book 13A, Title 38, Sec. 1604; *Hawaii Revised Laws* 1925, Sec. 2615, *Hawaii Revised Laws* 1935, Sec. 3823; 4 *Idaho Code*, Chap. 30, Sec. 19-3002; *People v. Pelumbo*, 5 Illinois 2d 409, 125 N. E. 2d 518 (1955); 2 (Part 1) *Burns Indiana Statutes*, Chap. 16, Sec. 9-1602, 9-1603, 2-1714; Vol. II, *Code of Iowa*, Sec. 622.7; *General Statutes of Kansas* (1949), Chap. 62, Art. 1420; *Kentucky Revised Statutes*, 1953, Chap. 421, Sec. 210 (421.210), Subsec.1; 2 *Louisiana Revised Statutes* 1950, Title 15, Chap. 1, Sec. 461; 4 *Revised Statutes of Maine* 1954, Chap. 148, Sec. 22; 2 *Annotated Code of Maryland* 1951, Art. 35, Sec. 4; 8 *Annotated Laws of Massachusetts*, Chap. 233, Sec. 20; *Compiled Laws of Michigan* 1948, Chap. 617, Sec. 67; 2 *Minnesota Statutes* 1953, Chap. 595, Sec. 02; 2 *Mississippi Code*, 1942, Chap. 8, Sec. 1689; *Missouri Revised Statutes* 1949, Chap. 546, Sec. 260 (546.260); *Revised Codes of Montana*, 1947, Annotated, Vol. 8, Title 94 (94-8802); 2 *Revised Statutes Nebraska* 1943, Chap. 25, Sec. 1203; 1 *Nevada Rev. Stat.*, Title 4, Chap. 48, Sec. 040(48.040); 5 *N. H. Rev. Stat.* 1955, Chap. 516, Sec. 27; *Revised New Jersey Statutes*, 1953, Title 2A, Chap. 81, Sec. 3 (2A:81-3); 6 *New Mexico Statutes* 1953, Chap. 41, Art. 12, Sec. 20; 7 *New York Consolidated Law Service* 1951, *Penal Law Part IV*, Art. 218, Sec. 2445; 1 B *General Statutes of North Carolina* 1953, Division II, Chap. 8, Art. 57; 3 *North Dakota Revised Code* of 1943, Title 31, Chap. 31-01, Sec. 02 (31-0102); *Ohio Revised Code* 1953, Chap. 2317; *Oklahoma Statutes* 1951, Title 22, Sec. 702; 1 *Oregon Revised Statutes*, Title 14, Chap. 139, Sec. 320 (139-320); *Purdon's Pennsylvania Statutes*, Title 19, Sec. 683; *Phillipine Island Penal Code* 1911, *Gen. Order 58* of 1900, Sec. 58; *General Laws of Rhode Island* (1956), Vol. 2, Title 9, Chap. 17, Sec. 13; 3 *Code of Laws of South Carolina* 1952, Title 26, Sec. 403 (26-403); 2 *South Dakota Code of 1939*, Title 36, Chap. 01 (36.01), Sec. 01 (36.0101); *Tennessee Code Annotated*, Vol. 5, Title 24, Sec. 103; *Texas Revised Code of Crim. Proc.* 1925, Art. 714; *Constitution of Utah*, Art. I, Sec. 12; *Vermont Statutes*, Rev. of 1947, Chap. 84, Art. 1738; 2 *Code of Virginia* 1950, Title 8, Sec. 288; 1 *Revised Code of Washington*, Title 5, Chap. 60 (5.60), Sec. 060 (5.60.060); 2 *West Virginia Code of 1955*, Chap. 57, Art. 3, Sec. 5728; *Wisconsin Statutes* 1951, Title 30, Chap. 325, Sec. 18 (325.18); *Wyoming Compiled Statutes of 1945*, Annotated, Vol. 1, Chap. 3, Sec. 2605.

petent testimony because of their interest in the case. Our review revealed the wisdom of that opinion, in that fifty-one of the fifty-two jurisdictions reviewed were in complete harmony with the decision, the State of Georgia alone, excepting.

No such overwhelming approval can be found in support of the abolition of the rule here under question. Of the fifty-two jurisdictions reviewed, in only thirteen, can one spouse be compelled to testify *against* the other in a criminal case.

Since the beginning, the common law rule has been recognized in Federal courts that one spouse is incompetent to testify against the other. This was reiterated in the *Graves case*, supra. Since the *Funk case*, four Federal Circuit Court decisions have been rendered on this rule. First came the *Paul case*, supra, then the *Yoder case*, supra, afterwards the *Brunner case*, supra and then came the *Walker case*. Only the Tenth Circuit which rendered the decision in the *Yoder case*, advocated the abolishment of this rule. All others have followed it.

Thus we have but one Circuit Court (Tenth Circuit in the *Yoder case*) and thirteen states which accord the decisions rendered in the case at bar, while all other jurisdictions refuse to disturb domestic tranquillity by allowing the prosecution to compel one spouse to testify against the other in a criminal case.

Can it be said that these few jurisdictions indicate the overwhelming trend in light of modern reason and experience.

Petitioner submits, in view of the authorities above cited, it was error to permit the Government to call as their witness Erma Lane Hawkins, wife of the defendant, over his objection.

II.

The Testimony Elicited by the Government from the Witness, Erma Lane Hawkins, Was Prejudicial to Petitioner and the Calling by the Government of Petitioner's Wife to be Sworn as a Witness Was Prejudicial to the Petitioner.

The testimony elicited from the wife of Petitioner testifying as a government witness and not otherwise in evidence was that she had used the name of Jane Wilson in November, 1955 (R. 41); that she was a prostitute at such time (R. 41); and had been a prostitute before meeting the Petitioner (R. 42). There was evidence that Jane Wilson was a prostitute (R. 34), but it was her testimony alone that made the Petitioner's wife a prostitute.

Without regard, for the present, that the evidence was given by the Petitioner's wife, the above testimony, of itself, incriminates Petitioner. Interstate transportation being admitted the only issue at trial was for what purpose. An intent and purpose on Petitioner's part that such purpose was immoral was an essential element of the offense. *Mortensen v. U. S., 322 U. S. 369; Dunn v. U. S., 190 F. 2d 496.* Such intent or purpose necessarily had to be shown by circumstantial evidence. *Lindsey v. U. S., 227 F. 2d 113.* Using Wigmore's chart of analysis in the case

at bar the Government offered testimonial assertions tending to show different circumstances that would infer the one proposition that Petitioner had the necessary intent or purpose. *1 Wigmore on Evidence, Third Edition, Sec. 25.* Without aid of testimonial assertions of wife the testimonial assertions offered by the Government may have sufficiently established the following relevant circumstances that (1) Petitioner and Lola Fay Moudy had conversation before interstate transportation, wherein Petitioner asked Lola Fay Moudy if she wanted to go to Tulsa and work with Jane (R. 8); (2) Petitioner made phone call in Tulsa and Jane and Tommie showed up (R. 13); (3) Lola Fay Moudy went with Jane and Tommie to hotel room where Jane advised her as to how to work as a prostitute (R. 13-14); (4) Lola Fay Moudy engaged in prostitution in Tulsa (R. 15); (5) after interstate transportation Lola Fay Moudy met Petitioner and went with him to Hot Springs to work as prostitute (R. 19-20); and, the testimonial assertions which were cumulative with testimonial assertions of wife may have sufficiently established the following relevant circumstances: that (6) working with Jane meant working as a prostitute (R. 9 and 41); (7) Jane was a prostitute (R. 34 and 41); and, the testimonial assertions offered by Government through Petitioner's wife alone may have sufficiently established the following relevant circumstances: that (8) Petitioner's wife was a prostitute (R. 41); (9) Petitioner's wife had been a prostitute before meeting Petitioner (R. 42); and, (10) Petitioner's wife was known as Jane Wilson. These last three circumstances asserted testimonially by the wife

alone could only have been offered to infer the proposition of the purpose, intent or motive of Petitioner. *1 Wigmore on Evidence, Third Edition, Sec. 216 at page 717.* If not, they could have been offered only to show bad character. Petitioner does not contend that the prosecution offered this evidence only to show bad character in view of this Court's power to notice such plain errors without assignment or specification. *United Brotherhood, Etc. v. U. S., 330 U. S. 395,* but Petitioner submits that such circumstances had probative effect upon the jury in determining the intent, motive and purpose of Petitioner in the interstate transportation and were prejudicial.

In *Krulewitch v. U. S., 336 U. S. 440,* testimony of an alleged co-conspirator of a purported conversation was received into evidence in violation of the hearsay rule and it was contended that the evidence was merely cumulative and should be held harmless. This Court recognizing that other evidence corroborated complaining witness on certain phases of the case, the jury had to choose between believing the complaining witness or the Petitioner as to the vital phases. This Court held there that such hearsay evidence was not harmless and to paraphrase the language of the Court at page 444, the Court could not say that the admission of the hearsay evidence "may not have been the weight that tipped the scale against Petitioner." So, in the case at bar, the circumstances that Petitioner's wife was known as Jane Wilson, and, was, and had been before meeting Petitioner, a prostitute would infer that *Petitioner* also knew that working with Jane meant working as a

prostitute, and such knowledge infer the purpose and intent of the interstate transportation. The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. See *Tot v. U. S., 319 U.S. 463, 467.* In the case at bar Petitioner testified that he did not have such knowledge and on the vital phase of the case, i.e., purpose, the jury had to choose, as in the *Krulewitch case*, supra, between believing the complaining witness and the petitioner.

The *Krulewitch case*, supra, and *Fiswick v. U. S., 329 U. S. 211*, a case involving similar inadmissible evidence reinforcing other evidence, follow the test set down in *Kotteakos v. U. S., 328 U. S. 750*, set out as follows:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *Bruno v. U. S.*, supra, 308 U. S. at page 294, 60 S. Ct. at page 200. But if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

and at page 762 U. S., at page 1246 S. Ct.:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination

> of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decises by what has been done in similar situations, c.f. *United States v. Socony Oil Co.*, supra, 310 U. S. at pages 240-242, 60 S. Ct. at pages 852, 853. Necessarily, the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the ballot for decision on the case as a whole, are material factors in judgment."

and at page 763 U. S., at page 1247 S. Ct.:

> "Thus, it is not the appellate court's function to determine guilt or innocence. *Weiler v. U. S.*, supra, 323 U. S. at page 611, 65 S. Ct. at page 551; *Bollenback v. United States*, 326 U. S. 607, 613, 614, 66 S. Ct. 402, 405, 406. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole critera for a reversal or affirmanee. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error."

Petitioner submits that such evidence clearly had a substantial influence in establishing purpose or intent of the interstate transportation, or, at least, leaves one in grave doubt as to whether it had such influence. The admission of the wife's testimony in the present case can be likened to the admissions in the *Fiswick case*, supra, of a co-defendant, received in evidence against all defendants erroneously, and to borrow a phrase from such case at page 220 "* * * evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project." So, in the case at bar, the testimony

of the wife was the only testimony cementing Jane Wilson, a known prostitute, with the Petitioner in the illegal project. Petitioner submits that at least there is a grave doubt as to whether this cementing together was not a substantial influence in the jury's determination of purpose or intent in the interstate transportation.

Petitioner submits that the placing by the Government of a wife of a person charged with a crime on the witness stand is prejudicial. *8 Wigmore on Evidence, Third Edition, Sec. 2243 at page 267* reads as follows:

> "If the spouse against whom it is desired to be called the other as a witness takes advantage of the privilege and thus causes the rejection of the witness, how far may this circumstance be taken as permitting the *inference* that the excluded testimony would be *unfavorable* to the party spouse?
>
> "The established principle (ante, Sec. 286) permits such an inference ordinarily, for the supression of available testimony, or the failure to utilize it. Must it yield in this instance, as being inconsistent with the full exercise of the privilege? The question has usually been answered in the affirmative:"

and Sec. 2243, at page 271, reads as follows:

> "Whether this conclusion is inevitable is at least open to argument. The argument against it is that there is no actual coercion and no actual denial of the privilege, but merely a dilemma and an option, which are created, not by any direct attempt to break into the privilege, but by the accidental coincidence, upon the same piece of testimony, of two independent principles of law, neither one of which should be made to yield rather than the other. This argument is nearly

the same as that which applies to the privilege against self-crimination (Post Sec. 2272), and need not be further notice here."

AND Sec. 2268, at page 392, reads as follows:

> "*Accused.* For the *party defendant in a criminal case*, the privilege permits him to refuse *answering any question whatever in the cause*, on the general principle that it 'tends to criminate' (ante, Sec. 2260) (*a*). This being so, the prosecution could nevertheless on principle have a right at least to *call him to be sworn*, because, as with ordinary witness, it could not be known before hand whether he would exercise his privilege. But no court seems ever to have sanctioned this application of the principle. * * * This result may be rested on several considerations: * * *(3) Even though the prosecution may be entitled to that opportunity at the earlier stage, still the exercise of this technical right need hardly be conceded, since the procedure could only have, as its chief effect, the emphasizing of his refusal, should he refuse, and thus the indirect suggestion of that inference against him from which he is protected by another aspect of the principle. (*Post*, Sec. 2272)."

Also see *Graves v. U. S., 150 U. S. 118*, condemning the prosecution's commenting on the failure of the Defendant's wife to testify.

It appears according to Wigmore that calling a privileged witness, as the wife of an accused, to be sworn, and forcing the witness to elect not to testify, could only emphasize the refusal and infer that the testimony would be unfavorable to the accused. Petitioner submits that this is and should be the rule and that its application in the trial of criminal cases would be in harmony and not do violence to the "harmless error" rule.

Without such rule there could be a rule which permitted the Government to place a spouse of an accused on the witness stand and allow her to testify insofar as her testimony would not be prejudicial to the accused.

Though such might not encourage the production of irrelevant testimony, it would do nothing to discourage such testimony, which should be done to maintain the orderly procedure of criminal trials and to prevent the records from being burdened.

To follow such rule would not do violence to the "harmless error" rule in that such rule was intended to prevent reversal of convictions on matters technical but not substantive. *Kotteakos v. U. S., 328 U. S. 750.*

Here there could be no misinterpretation by the trial court as to whether evidence was hearsay, whether the law requires a particular instruction to the jury, whether the evidence was at variance with an indictment, or, whether the indictment is sufficient. The overt act of the prosecution in calling the spouse of an accused to be sworn as a witness is unequivocal and cannot be subject to interpretation. Such act would not have to be correlated with any evidence, pleading, procedure, or substantive law, but would stand alone as error and this Court would not be called upon as in the many "harmless error" cases, to review the evidence in this situation to determine if the spouse testified to matters prejudicial to accused.

Though no contention is made that the rights of the Government or accused should be governed by cost, there

can be no estimate of the time and expense required of this Court, the Courts below, and the litigants participating therein, could be made with any accuracy if Wigmore's rationale is not followed, though one could safely say it would be immeasurably great.

Petitioner submits that the common law rule rendering a spouse of an accused incompetent to testify against such accused charged with a criminal offense, and that the reason for such rule, and the continued existence of such reason, is still sound; that the testimony of the Petitioner's wife incriminated him in that such testimony strongly inferred his intent and purpose in the interstate transportation; and, that the calling of Petitioner's wife to be sworn was error, in itself, because of the inference, caused by her refusal, that her testimony would be unfavorable to Petitioner.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

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August 19, 1958.

APPENDIX A

Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772.

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the Territory of Alaska, the District of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

"The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

"Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Federal Rules of Criminal Procedure, Rule 26.

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Act of May 24, 1949, c. 139, Sec. 110, 63 Stat. 108, 28 U. S. C., Sec. 2111.

"Harmless Error. On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Criminal Procedure, Rule 52(a).

Harmless Error.

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

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In the Supreme Court of the United States

OCTOBER TERM, 1957

JAMES CLIFTON HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 652

JAMES CLIFTON HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B. 11-13; R. 3-7) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1957 (Pet. App. B. 10-11; R. 8). The petition for a writ of certiorari was filed on December 9, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to permit petitioner's wife to testify as a government witness.

2. Whether, if there was error in this respect, it was prejudicial.

RULE INVOLVED

Rule 26, F. R. Crim. P., provides:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

Petitioner was found guilty by a jury in the United States District Court for the Northern District of Oklahoma of knowingly transporting Lola Fay Moudy on or about November 23, 1955 from Mena, Arkansas, to Tulsa, Oklahoma, in violation of the Mann Act (18 U.S.C. 2421) (Tr. 3).[1] He was sentenced to a term of imprisonment of 5 years (Tr. 4).

The evidence in support of the verdict may be summarized as follows:—

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[1] The designation "Tr." refers to the stenographic transcript of the trial proceedings.

The principal government witness was the girl alleged to have been transported, eighteen-year-old Lola Fay Moudy. She testified that she had worked in a beer tavern in Dogpatch, Oklahoma, near petitioner's dance hall (Tr. 7-8). In November 1955 she told petitioner that she wanted a better job and he asked her if she wanted to go up to Tulsa and work with a Jane Wilson (Tr. 8). She understood that this meant to work as a prostitute (Tr. 9). Subsequently, petitioner drove her in a Cadillac with leopard skin upholstery from Dogpatch, Oklahoma, through Mena, Arkansas, where a headlight was repaired, to Tulsa, Oklahoma (Tr. 11-12). After a phone call at a Tulsa gas station, Jane Wilson and another girl named Tommie got Lola from petitioner's car and took her to Jane's hotel room (Tr. 12-13). Jane gave Lola advice on her work. The following day, Lola registered at another hotel (Tr. 13). She stayed for a few days and engaged in prostitution. After being arrested, she went to another hotel where she continued to engage in prostitution. Within a day or two, she went with Jane and Tommie to Fort Smith, Arkansas, where she met petitioner. She left with him for Hot Springs "to work." However, she did not work there and left for home alone shortly thereafter (Tr. 14-19).

The testimony of the complaining witness was corroborated by her father who testified that in November 1955 he saw his daughter leave in a large light-colored car (Tr. 32-33). Tommie Alexander testified that she and Jane Wilson picked up the complaining

witness (known as Johnnie) at a gas station in Tulsa from a light-colored Cadillac driven by a man (not otherwise identified) (Tr. 25-27). Tommie also testified that she and Jane drove with the complaining witness from Tulsa to Fort Smith in the early part of December 1955 (Tr. 27-28). A clerk in the Corona Hotel in Tulsa testified that he saw Jane Wilson and Tommie Alexander leave the hotel together early one morning of November 1955 and come back with a third girl, Johnnie, who visited with the other girls for a few hours. He testified that he knew Jane and Tommie to be prostitutes (Tr. 29-31). An employee of a gas station in Mena, Arkansas, testified that in November 1955 he repaired a headlight on an orange Cadillac with leopard skin upholstery (Tr. 33-34).

Petitioner's wife testified for the government over petitioner's objection. She said she was separated from petitioner; that during November 1955 she used the name Jane Wilson and engaged in prostitution (Tr. 35-37). On cross-examination she testified that she was not living with petitioner in November 1955; that during the time she lived with him she did not engage in prostitution; and that he did not know she was engaged in prostitution (Tr. 37).

Petitioner took the stand, admitted that he had transported Lola Fay Moudy to Tulsa so that she might get a job, but said that he did not find out until later that his wife was engaged in prostitution (Tr. 41). Under cross-examination, petitioner said that he had received money from his wife during No-

vember 1955 (Tr. 44). His wife was then recalled to the stand as a defense witness to confirm his statement that this money was sent to repay a sum which she had taken from the cash register when she left (Tr. 48).

The Court of Appeals affirmed the judgment of conviction on the separate grounds, (1) that petitioner's wife was competent to testify against her husband, and (2) that even if she were not, the admission of her testimony was harmless error (Pet. App. B. 11-13).

ARGUMENT

1. There is a conflict of circuits as to whether a wife, who is not the injured party, is competent to testify *against* her husband. The views of the Tenth Circuit in the instant case that she is competent were foreshadowed in *Yoder* v. *United States*, 80 F. 2d 665, where, however, the woman was in fact divorced at the time of trial. The Second Circuit in *United States* v. *Walker*, 176 F. 2d 564, held that a separated wife is incompetent to testify against her husband since there is always the possibility of reconciliation. See also as barring the testimony of a husband separated from his wife, *Paul* v. *United States*, 79 F. 2d 561 (C.A. 3), and generally to the effect that a wife cannot testify against her husband, *Brunner* v. *United States*, 168 F. 2d 281 (C.A. 6). The government's petition for a writ of certiorari to the Second Circuit in the *Walker* case was denied. 338 U.S. 891.

The government, believing that this conflict should be resolved, would not oppose the request that certiorari be granted in this case were it not for the independent ground on which the decision below rests, *i.e.* that even if there was error, it was, in the circumstances of this case, harmless. This conclusion of the Court of Appeals appears to us correct on this record, and we would urge affirmance on that ground if certiorari were to be granted. We do not believe that in these circumstances we would be justified in again asking the Court to consider the more general question of the competency of the wife to testify against her husband.

2. The testimony of petitioner's wife as a government witness on direct examination was limited to the facts that in November 1955 she used the name Jane Wilson and engaged in prostitution. It is this testimony to which petitioner objects (Pet. 6). But both of these facts had already been established independently of the wife's testimony.

The fact that Jane Wilson was a prostitute was brought out by the uncontradicted testimony of Lola Fay Moudy[2] and the hotel clerk.[3] The fact that Jane Wilson was the wife of the petitioner had been repeatedly referred to by petitioner's counsel himself

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[2] "Well, she [Jane Wilson] was just telling me how to act when I went into a room, how much to charge for dates, what kind of dates they was." (Tr. 13)

[3] "Q. Now this Jane Wilson and Tommie Alexander, do you know them to be prostitutes?
"A. Yes, sir." (Tr. 29)

in cross-examination of the complaining witness.[4] In the light of this record, we believe that any error in allowing the wife to testify was harmless.

It should be noted that the wife's testimony was favorable to the petitioner on cross-examination, where she testified that petitioner did not know she was engaged in prostitution (Tr. 37), and that petitioner later recalled his wife as a defense witness where she again testified in his support. Under all these circumstances, we conclude that this case does not raise the broad question as to whether a wife who is not the injured party is a competent witness against her husband.

---

[4] "Q. Did you know who Jane was?
"A. Well, no, not exactly.
"Q. You do now, don't you?
"A. Yes, I do.
"Q. *She was his wife, separated from him, isn't that right;* did you know about that?
"A. I don't know anything about their personal life at all." (Tr. 21)

* * * *

"Q. After you got back to Fort Smith and you wanted to go down to Hot Springs, I believe, do you know whether or not you had a conversation with Mr. Hawkins there about *his wife hustling up here in Tulsa?*
"A. No." (Tr. 22)

* * * *

"Q. Didn't this occur: Didn't he tell you he was on his way to Oklahoma City, and was bringing you by Tulsa *to get a job with his wife?*
"A. No, he didn't. It didn't occur to me that he was going to Oklahoma City, but he was bringing me up here.
"Q. *For his wife to get you a job?*
"A. Yes.
"Q. She got you one, didn't she?
"A. Yes." (Tr. 23) (emphasis added throughout)

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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OCTOBER TERM, 1958

No. 20

JAMES CLIFTON HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. B 11-13; R. 56-58) is reported in 249 F. 2d 735.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1957 (R. 59). The petition for a writ of certiorari was filed on December 9, 1957, and granted on January 20, 1958. 355 U.S. 925. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a wife may voluntarily testify against her husband in a criminal action, without his consent.

2. Whether petitioner was prejudiced by his wife's testimony.

STATUTES AND RULES INVOLVED

1. The pertinent part of 18 U.S.C. 2421 provides:

> Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * *
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> * * * *
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> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

2. 18 U.S.C. 3771 provides:

> The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the Territory of Alaska, the district of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

3. Rule 26, Federal Rules of Criminal Procedure, provides:

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

4. Rule 52(a), Federal Rules of Criminal Procedure, provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

STATEMENT

Petitioner was convicted in the District Court for the Northern District of Oklahoma of violating the Mann Act and was given a sentence of five years imprisonment (R. 2-3). The charge was that on or about November 23, 1955, he knowingly transported for immoral purposes one Lola Fay Moudy in interstate commerce from Mena, Arkansas, to Tulsa, Oklahoma (R. 2).

1. The principal government witness was Lola Fay Moudy, a girl seventeen years old at the time of the occurrences in question. She testified that in November, 1955, she was living near Beachland, Oklahoma, and was working at a place called Dogpatch, which consisted of a tavern, where she was employed, a dance hall, owned by petitioner, and one house (R. 5-8, 28). She told petitioner that she wanted a job paying better money than she was getting at the tavern and he suggested that she should go to Tulsa and work with Jane Wilson. She understood this meant working as a prostitute. She did not know whether Jane Wilson was married to petitioner (R. 8-9).

Lola accepted this suggestion and she and petitioner set out in petitioner's car, an orange Cadillac with leopard skin seat covers and "Hawk" written across the back seat. They first stopped at petitioner's home in Hatfield, Arkansas, and then at a filling station in Mena, Arkansas, where a repair was made to the car (R. 10-12). They then drove on to Tulsa, arriving after midnight at a filling station in the outskirts, where petitioner made a phone call. About a half hour later, Jane Wilson and another girl, known to the witness only as Tommie, joined them (R. 12-13). Some time later, the three girls went to a room at the Corona Hotel in Tulsa. Jane told Lola how to act when she went into a room and how much to charge for dates (R. 13-14).

The next morning, Lola moved to the Bliss Hotel, where she registered as "Johnnie Maguire," a name which petitioner had suggested (R. 14-15, 21). She

stayed there a couple of nights and had a few dates, which led to her arrest (R. 15). She called the Corona Hotel and got Tommie, who came down and paid her twenty-five dollar fine. After that, Lola went to a rooming house, staying there one night. A day or so later, the three girls went to Fort Smith, Arkansas, in Jane's car. The next day, petitioner joined them and they spent a night together at Hot Springs. Lola then went back home (R. 15-21).

Various witnesses were called to corroborate this account. Tommie Alexander testified that she had formerly been a prostitute. In November, 1955, when she was staying at the Corona Hotel in Tulsa, she went with Jane Wilson, a friend of hers, to a filling station on the highway. A girl got out of a light colored Cadillac, driven by a man, and came over to their car. The girl was introduced as Johnnie Maguire. They took her back to the hotel and talked a while. A few days later they all three drove to Fort Smith, Arkansas. Tommie stated that she did not know if Jane was a prostitute and was not certain whether Jane was married to petitioner (R. 28-33).

The clerk at the Corona Hotel, in Tulsa, testified concerning the late telephone call to Jane Wilson, following which she and Tommie Alexander left and came back with a girl who they said was Johnnie Maguire. Johnnie had stayed there one night without registering. He thought that Jane Wilson and Tommie Alexander were prostitutes (R. 33-36).

The father of Lola Moudy testified to her leaving on a trip in a light colored car (R. 37-38). An attendant at a filling station in Mena, Arkansas, re-

membered the car, but was hazy as to other details (R. 38-39). The manager of the Bliss Hotel, in Tulsa, identified the registration card of Johnnie Maguire, dated November 24, 1955 (R. 42-43).

2. The issue in this case arises because the government called as a witness Erma Lane Hawkins, also known as Jane Wilson. At the outset of her testimony, this witness was asked on voir dire as to her marital relationship with petitioner. She stated that she had been married to petitioner on July 5, 1954, and had never been divorced. She said that they were not then living together as husband and wife, and that they had had a previous separation. Petitioner's objection to permitting her to testify was overruled by the court (R. 40-41).

She then testified that during November 1955 she was using the name of Jane Wilson. At that time she was a prostitute (R. 41). On cross-examination, she said that she did not live with petitioner for very long and was not living with him in November, 1955. She stated that she was not a prostitute at the time they were living together and that petitioner did not know about such activities on her part. On redirect examination, she said that she had worked as a prostitute before she met petitioner (R. 42).[1]

3. Petitioner, testifying in his own behalf, said that Lola Moudy had asked him several times if he could get her a job. He was going to Oklahoma City on

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[1] This witness was also recalled by petitioner in rebuttal, to testify that certain money she had sent petitioner after their separation was to repay him for money she had taken from his cash register (R. 54).

business and told her she could ride to Tulsa, where he would contact his "ex-wife" for her. His attorney corrected this slip of the tongue, and petitioner said that he and his wife had never lived together much (R. 46).

He said he did not know what business his wife was engaged in and added (R. 46):

> That's the main reason why I brought this girl up here, and got her, had my wife contact her, or her get in touch with my wife, so that I might find out if she was engaged in prostitution, since we were thinking about trying to make it again.

When he brought Lola Moudy back from Fort Smith, Arkansas, he found out that his wife had been engaged in prostitution (R. 47). He never discussed money or took any money from Lola Moudy (R. 47). The purpose of his trip, in addition to bringing her, was to pick up a deed in Oklahoma City (R. 47-48).

SUMMARY OF ARGUMENT

The government's basic position in this case is that, while reason and experience justify the view that one spouse should not be compelled to testify against the other, a spouse who is willing to testify should not be debarred from doing so. In other words, we think the marital privilege should be that of the witness, and not of the accused. Preservation of the marital privilege in many jurisdictions, despite a considerable body of criticism, stems from the failure to make this distinction between compelling the spouse to testify and permitting her to testify if she is willing.

I

The central question whether to accept or reject the privilege of an accused to exclude spousal testimony is a matter on which this Court has great freedom to enunciate a rational rule, unfettered by common law practice. Rule 26 of the Rules of Criminal Procedure lays down a broad standard in such matters—that the Court shall be governed by the principles of the common law interpreted in the light of reason and experience. The cases which led up to this liberal standard, and those which have followed it, make it even clearer than the language of the Rule alone that the Court has wide power to mold the law on this subject.

II

Following this broad standard—guidance by reason and experience—the Court should reject the common law privilege *of an accused* against adverse spousal testimony, and should recognize that the privilege is that *of the witness-spouse.*

A. From the beginning, there has been a confusion of concepts which has led to unfortunate results and is still retarding needed reform. The common law *disqualified* both spouses from testifying in either civil or criminal actions. But there is a fundamental distinction between testimony which is *for* the other spouse and that which is *against* him. In the former instance, there was no longer any reason to exclude favorable spousal testimony when the common law disqualification because of interest was removed; and it has been so held. In the latter situation, where the testimony is unfavorable, there is certainly no

reason to exclude it if the spouses are willing to admit it. Therefore, the right to exclude is a true privilege, which many have said belongs to both spouses—the one who is a party and the one who is a witness.

We challenge the assumption that the privilege appertains to the defendant-spouse. The reasons supporting the privilege of the witness-spouse are not those which can be adduced to uphold the privilege of the accused. In the former case, there are potent reasons for the law's refusal to compel one spouse to be the cause of the downfall of the other, similar to the grounds which an enlightened jurisprudence recognizes in support of the privilege against self-incrimination. But, as we shall show, these considerations do not apply to the "privilege" of the accused to exclude unfavorable spousal testimony—an alleged privilege which is without comparable justification.

B. Since petitioner's separated wife testified voluntarily, the only question directly involved in this case is the accused's "privilege". Probably the earliest reason urged in support of that privilege was the common law unity of husband and wife, which no longer exists either factually or conceptually. Another reason is said to be a natural repugnance against admitting such testimony. Insofar as this is limited to compulsion on one spouse to testify against the other, this position is well taken—but it relates only to the privilege of the witness-spouse. There is no inherent or natural antipathy to permitting a spouse to testify adversely, where she is willing to appear. Frequently, the most unjust results come about because her lips

are sealed. She [2] may not be able to testify where a child (even her own child) has been abused, ravished, or even killed. Her testimony may be excluded where she is the only witness to prove the most vicious acts of her husband toward other people. The wrongdoer should not have the power to silence her testimony if she is willing to give it.

The principal reason which has been advanced in support of the defendant's privilege is that it tends to preserve marital peace. In practice, this consideration usually has no application, because the question only arises where the spouse is willing to testify (as in the instant case) and the spouse is not ordinarily willing until there is no longer any marital peace to preserve. Moreover, the principle leads to various extreme results, for example in bigamy trials, where the very issue to be determined is the same issue determining the admissibility of the testimony of one "wife" or the other. Usually the testimony of the second "wife" is admitted, giving her a right greater than that of the true and lawful wife. The same reasoning admits the testimony of a mistress, while shutting the door to that of the true wife.

There are various other discrepancies between reason and practice. From the first it was recognized, as a matter of necessity, that the wife should be allowed to testify to corporal wrongs inflicted on her by her husband. This was extended to other wrongs affecting the conjugal relation, and, more liberally in other jurisdictions, to all cases where the rights of husband

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[2] Ordinarily, it is the wife who is the witness and the husband who is the accused.

and wife are opposed. Where the exception because of "necessity" has been held to its limited common law scope, it has led to the harsh results mentioned above.

C. The great weight of authority among writers on the subject favors abrogation of the defendant's privilege. From the time of Jeremy Bentham to the present very few have defended a rule which often leads to injustice. The rule in countries following the civil law is that which we urge this Court to adopt—that the testimony of the spouse is not compellable, but is competent. This has also to some degree been recognized as a rational solution in England and in some states.

The decisions of this Court have moved progressively in the direction of rejecting the defendant's privilege. Starting with the orthodox, common law view that there was a disqualification of both spouses (save for the exception said to be based on necessity), the Court later abolished the disqualification of a spouse from giving favorable testimony. *Funk* v. *United States*, 290 U.S. 371. Then it recognized that the privilege to exclude confidential communications between husband and wife had the effect of suppressing relevant testimony and should therefore be given a strict construction. *Wolfle* v. *United States*, 291 U.S. 7. And it went to the verge of deciding the question here presented when it held that, in view of Rule 26, the common law privilege against adverse spousal testimony should not be recognized where the marriage was a sham. *Lutwak* v. *United States*, 344 U.S. 604. Although opinion in the Courts of Appeals

has divided on the exact question, the majority have conservatively held to the view that any further steps in the direction indicated by *Funk* should be taken by this Court rather than by lower courts. However, in this Court there is no occasion for such reluctance. Reason and experience unite to sustain a full rejection of the accused's privilege.

III

In any event, there should be no reversal in the instant case. The separated wife of the accused testified to only one matter of any substance, that she was a prostitute. This appeared abundantly by the testimony of other witnesses. Moreover, whatever slight weight her evidence might have in proof of the government's case was dissipated when petitioner himself testified that he had found out that such was the fact.

ARGUMENT

The issue in this case is a limited one—whether a woman separated from her husband, who is willing to testify against him as to occurrences which are not confidential, should be prevented from doing so because of the defendant-husband's objection. There is no question as to confidential communications between husband and wife during the period of the marital relationship. No attempt was made to adduce from the wife any testimony as to what her husband had told her. Neither is there any issue as to whether a wife, who does not wish to do so, may be compelled to testify against her husband. There is no claim that the wife was testifying against her

will. The single issue is whether the husband has a privilege against his wife's testimony which enables *him* to bar her testimony, even though she herself is willing to testify.

It is the government's position that there is a vast difference between compelling a wife to testify against her husband and permitting her to testify if, of her own volition, she chooses to do so. The valid arguments in favor of the marital privilege against permitting unfavorable testimony are arguments only against *compelling* such testimony. There is no comparable justification for according the accused a privilege to bar the testimony of a willing spouse. In other words, we think the privilege should be that of the witness and not that of the spouse against whom the testimony is offered.

Before giving our reasons for that conclusion, we discuss the power of this Court to formulate rules of evidence in the light of reason and experience. We then suggest why the Court should exercise that power to permit the voluntary testimony of one spouse against the other.

I.

This Court Has Broad Power To Formulate Rules Of Evidence For Federal Criminal Trials In The Light Of Reason and Experience

Under Rule 26, F. R. Crim. P., the admissibility of evidence is governed, generally, "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." This is a restatement of principles which

were already fully recognized when the Rule was adopted. A review of the decisions which preceded it show a steady broadening of the scope of the evidence which has been admitted and make clear that the Rule is to be applied with liberality.

The Judiciary Act of 1789, by Section 34, 1 Stat. 73, 92, seemed to lay down a rule of conformity with state law on all matters both of procedural and substantive law.[3] From the first, however, there was a reluctance on the part of the Court to give full effect to its seemingly explicit terms.[4] In *United States* v. *Reid*, 12 How.

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[3] That section provided:

"That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply."

[4] See, for example, the following cases:

Robinson v. *Campbell*, 3 Wheat, 212, 222-223, which held that remedies in the courts of the United States should be "not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles." *Wayman* v. *Southard*, 10 Wheat. 1 (opinion by Chief Justice Marshall), holding inapplicable a Kentucky statute for the relief of debtors by requiring judgment creditors to accept as satisfaction the bank notes of the state bank, because Section 34 of the Judiciary Act of 1789 applied a "rule of decision" during the course of the trial, rather than attempting to affect proceedings thereafter which were ministerial in nature; the applicable rule was held to be the common law in the several states. *Swift* v. *Tyson*, 16 Peters 1, holding that "laws," as used in Section 34, had reference to the statutes and the construction thereof by the state courts and to rights and titles having a permanent locality, but not to questions of a more general

361, 363, it was held that Section 34 did not apply to criminal actions, for the reason that this would "place the criminal jurisprudence of one sovereignty under the control of another"; some certain and established rule must have been in the mind of Congress, "so familiar and well understood in the trial by jury that legislation on the subject would be deemed superfluous" (*id.* at p. 365). This could not have been the common law of England at the time of the Act, because that was a foreign country, nor the law of England at the time of the settlement of the various colonies, because of the abuses which then existed and which had been recognized by adopting the Fifth and Sixth Amendments to the Constitution. Therefore, by process of elimination, the Court concluded that the applicable rules were those in effect in the respective states in 1789, which could be amended by Congress, but not by the states (for federal purposes).[5] When the ques-

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nature, such as those involving commercial law or the law of contracts. (Research by Prof. Warren, as set forth in *History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 86-88, showed, by an examination of the original draft of the act, with its erasures and interlineations, that the legislative intent was apparently to require conformity not only to the statute law, but the common law of the several states. This research led to the eventual overruling of *Swift* v. *Tyson*, and the vast body of law based thereon, in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64.)

[5] Wigmore, in his treatise on *Evidence* (3d Ed., 1940), Vol. 1, Sec. 6, refers to this construction of the Judiciary Act as "singular and indefensible" (p. 175). Indefensible it may possibly be, especially in the light of later progress in the law of evidence, but it was not wholly singular. In the treason trial of Aaron Burr, Chief Justice Marshall, on circuit, had held: "It would seem to me too that the technical term, 'trials at

tion later arose as to what law would be applied in a state admitted to the union since 1789, it was held to be the common law in effect in that state at the time of such admission. *Logan* v. *United States*, 144 U.S. 263, 299, 303.

Shortly afterward, however, the Court decided *Benson* v. *United States*, 146 U.S. 325, and a different trend was begun. This case involved the same evidentiary question as *Reid*, whether a co-defendant who was being tried separately could testify, and it was held that he could. Certain distinctions (not now important) can be pointed out, but the significant change was in the attitude of the Court that it was not necessarily bound by the common law as it may have existed in 1789 or on any other date. It was said, at page 336:

> Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors.

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common law,' used in the section [Section 34] is not correctly applicable to prosecutions for crimes. I have always conceived them to be, in this section, applied to civil suits, as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty." *United States* v. *Burr*, 25 Fed. Cas., No. 14,694, page 188. A disposition to look to the common law of England in determining questions of admissibility of evidence in criminal cases is shown in *United States* v. *Gooding*, 12 Wheat. 460, 469, and in *United States* v. *Murphy*, 16 Pet. 203, 209 (both opinions by Justice Story, who also wrote the opinion in *Swift* v. *Tyson*, *supra*).

> But the last fifty years have wrought a great change on these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction.

Therefore, since an 1878 statute made the defendant on trial a competent witness, the Court held that there was no sufficient reason for rejecting the testimony of his co-defendant, who had been granted a severance.

This line of reasoning was carried even further in *Rosen* v. *United States*, 245 U.S. 467, 469, 471:

> In the almost twenty years which have elapsed since the decision of the *Benson Case*, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.
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> Satisfied as we are that the legislation and the very great weight of judicial authority which

> have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved.[6]

The Court seemed to return for the moment to the standard of *Reid* in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 195, and in *Olmstead* v. *United States*, 277 U.S. 438, but in *Funk* v. *United States*, 290 U.S. 371, it completely threw off the shackles binding it to the common law of any particular date in determining the rules of evidence. This celebrated case involved the disqualification of a wife to testify in behalf of her husband. The opinion pointed out that *Benson* and *Rosen*, *supra*, were not wholly in conflict with *Reid* and *Logan*, *supra*, but rejected the concept of the two earlier cases that the courts "are still chained to the ancient formulæ and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions" (p. 379). The Court further held that judicial construction and the spirit of legislation had steadily removed the barriers to competency; that the general tendency of legislation both in England and in this country had been to remove the disqualification of the defendant because of interest; and that it was incongruous to retain the disqualification of the defendant's spouse, whose interest was similar

[6] Justices Van Devanter and McReynolds dissented without opinion.

but obviously less. As to the public policy said to support the old rule, Mr. Justice Sutherland said, at page 381:

> And since experience is of all teachers the most dependable and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

The contention of the government that the responsibility for change in the common law rule disqualifying the spouse rested with Congress was rejected, 290 U.S. at 382:

> Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?

The conclusion was that the reason for the rule of disqualification had ceased to exist and that the common law, with its adaptability to changed conditions, could move forward without waiting for legislative action.

At the same term, the Court decided *Wolfle* v. *United States*, 291 U.S. 7, holding that where a man dictated a letter to his wife, its contents could be testified to by his secretary, based on her stenographic notes.

The Court said, 291 U.S. at page 12, that "rules governing the competence of witnesses in criminal trials in the federal courts * * * are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience."

This language was incorporated almost verbatim into Rule 26, F. R. Crim. P. As the Court recently said in *Lutwak* v. *United States*, 344 U.S. 604, 614, discussing Rule 26:

> Under this rule, the competency of witnesses is to be governed by the principles of the common law as they *may be* interpreted by the courts in the light of reason and experience. The governing principles are not necessarily as they had existed at common law... Congress has not acted, and has specifically authorized this Court to prescribe rules of criminal procedure, but the rules do not specifically answer the problem here. Therefore, it is open to us to say whether we shall go further and abrogate this common-law rule disqualifying one spouse from testifying in criminal cases *against* the other spouse. (Emphasis the Court's.)

A code of evidence could have been formulated by the Court under the Act authorizing the formulation of Rules of Criminal Procedure,[7] but it has preferred

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[7] 18 U.S.C. 3771 provides:

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases * * *."

to move forward, a step at a time, by judicial decision. There is no doubt, however, of the power of the Court to lay down a rule that is consonant with its independent concepts of what is now just and practical in the light of reason and experience. The precedents do not bind the Court; they liberate it.

II

In The Light Of Reason And Experience, An Accused Should Not Have A Privilege Against The Adverse Testimony Of His Spouse

A. *A distinction should be recognized between the right of a spouse to refuse to testify against the other and the right of a court to receive the testimony, as here, of a spouse who is willing to testify.*

At one time there was a blanket exclusion of all spousal testimony. Blackstone (*Commentaries*, Vol 1, 443) stated the reason to be:

> (I)f they were admitted to be witnesses *for* each other, they would contradict one maxim of law "*nemo in propria causa testis esse debet*;" and if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*".

It is apparent that the "rule" had two parts, resting on different grounds. Favorable testimony was not allowed because, until about a hundred years ago, interested parties were not allowed to testify. The disqualification of a spouse was a logical corollary of the disqualification of the party. When the disqualification of the party was removed by statute, in due time the courts recognized that the disqualifica-

tion of the spouse should also be removed. *Funk* v. *United States*, 290 U.S. 371, discussed *supra*, pp. 18-19.

The part of the rule prohibiting *unfavorable* testimony was at first regarded as inherent in the general disqualification of spousal testimony. Later it was seen that no one had an interest in excluding unfavorable testimony except the spouses themselves, and the right to exclude such testimony was recognized as a privilege. Further, it was said that it was a privilege which belonged to both spouses, so that the consent of both was necessary to render the evidence admissible.

It is this latter part of the "rule", involving the "privilege" rather thar the "disqualification", which is under consideration in the present case. The problem is whether this "privilege" shall be recognized, and if so whose privilege and to what extent.[8] In our view, those seeking reform in the rule as to adverse spousal testimony may have gone too far in attacking the *privilege of the witness-spouse*. The reasons for such a privilege on the part of the witness, and for a privilege on the part of the defendant, are different. We doubt the wisdom of rejecting the *privilege* of the witness-spouse to *refuse* to testify. A deep-seated psychological, and perhaps moral, reluctance to abol-

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[8] Where the orthodox position has given ground, usually the privilege of the accused has still been retained as to so-called "confidential communications" between spouses. As noted at the outset of the Argument, *supra*, p. 12, this aspect of the marital privilege is not involved in this case. Nothing that the wife of the accused said here could possibly be construed as the revelation of a confidential communication.

ishing *this* privilege, together with a failure to differentiate between the privilege of the witness and of the accused, probably accounts for the fact that rejection of the accused's privilege has proceeded slowly although, as we show below, writers have for many years favored that position.

Lord Coke has received over the years the criticism that he confused the disqualification to give favorable evidence for the accused with the privilege against unfavorable evidence (see *infra*, pp. 26, 27). But his critics seem to have continued the confusion to some extent by failing adequately to distinguish between the reasons favoring the privilege of the *accused* with those which support the privilege of the *witness-spouse.* Thus, Professor Wigmore, in criticizing the privilege as a whole, dismisses as sentiment one of the reasons offered in support of the rule, which he phrases thus:

> A second reason, having some plausibility, and well expressed in the language of Mr. Justice Irvin and Mr. Justice Campbell, comes in substance to this, that there is a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner.[9]

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[9] Wigmore, *Evidence*, Sec. 2228, p. 227. A similar view, perhaps inspired by Professor Wigmore, is expressed in the comment to Rule 23(2) of the Uniform Rules of Evidence: "This abolishes the rule, still existing in some states and largely a sentimental relic, of not requiring one spouse to testify against the other in a criminal action."

But we suggest that there is a general reluctance and aversion to *compelling* a man or a woman to testify against his or her life-partner. The right of the spouse to remain silent is akin to the privilege against self-incrimination. For the spouse it can be said, as it was in the *Trial of Lilburn and Wharton*, 3 How. St. Tr. 1315, 1332 (1637):

> [T]his Oath is against the very law of nature; for nature is always a preserver of itself, and not a destroyer: But if a man takes this wicked oath, he destroys and undoes himself, as daily experience doth witness.

The purpose of the privilege against self-incrimination is said to be the "reflection of a humane attitude which saves even the guilty from a harsh choice among perjury, recalcitrance, or confession".[10] A similar attitude would protect the spouse of the accused. Blackstone expressed the idea (but without making the differentiation later developed between the privilege of the accused and the privilege of the witness) when he wrote that if husband and wife were admitted as witnesses *against* each other, that would contradict the maxim that no one should be held to accuse himself.[11]

All this, however, relates to the privilege of the spouse to refuse to testify; it does not relate to the question of whether a spouse who is willing to testify

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[10] Meltzer, *Required Records*, The McCarran Act, *and The Privilege Against Self-Incrimination*, 18 U. Chi. L. Rev. 687, 692-693 (1951) reprinted in *Selected Writings on Evidence and Trial*, Association of American Law Schools, 270, 275.

[11] 1 Blackstone, *Commentaries*, 443, cited *supra*, p. 21.

should be barred from doing so by the assertion of the privilege by the accused. As already indicated, it is the government's position that the marital privilege should be that of the witness, and not of the accused; that there is no adequate reason why the accused should be the one to determine whether unfavorable testimony should be given against him by his willing spouse; and that, in many situations, recognition of a privilege of the accused to bar the testimony of the willing witness-spouse results in situations more unjust than any involved in rejection of the privilege.

B. *The reasons given for supporting the old rule, which excluded all spousal testimony, are inadequate to justify retention of the privilege on the part of the accused.*

Three principal reasons have been given in support of the privilege of an accused against adverse spousal testimony: (1) the old concept of unity between husband and wife; (2) the preservation of marital peace; and (3) a "natural repugnance" felt at admitting such testimony.[12] See 8 Wigmore, *op. cit.* Sec. 2228, pp. 225-227, *supra.*

1. As pointed out above (*supra*, pp. 23-24), the "natural repugnance" argument (the third reason) goes mainly to the right of the spouse to refuse to testify, a privilege which we agree should be recognized. It has also been said, in Professor Wigmore's statement of the contention, that there is a natural repugnance

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[12] For other suggested reasons, see Connor, *The Qualification of Defendant's Spouse as a Witness in Criminal Cases*, 9 Notre Dame Law Review 272, 273-274 (1934).

"to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner." We think this has very little merit in the situation where the spouse testifies voluntarily. The accused's predicament is the result of his own wrongful actions and there is no reason why the court should be deeply concerned over the sensitivity of his feelings about who should be allowed to testify against him. Conviction is a "humiliation" in any case.

2. Turning to the first reason, the unity of husband and wife, the authority usually cited as originating the doctrine is Lord Coke, who wrote in 1628:

> *Note*, it hath been resolved by the justices that a wife cannot be produced either against or for her husband, *"qua sunt duae animae in carne una"*; and it might be a cause of implacable discord and dissention between the husband and the wife, and a meane of great inconvenience; * * * [13]

Wigmore, speaking of this passage, says:

> He it was who struck the first false note. He mouthed a few Latin words of mediaeval scholasticism, and suggested a consideration doubtful in its morality and narrow in its view of human nature; and his successors seem to have been satisfied not to improve upon this example.[14]

It is perhaps unhistorical to criticize what was written more than three hundred years ago in the light of subsequent developments of law, morals, and mores. The idea of marital unity was recognized in Coke's time; Bracton had written four hundred years

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[13] Coke, *Littleton*, 6b.

[14] 8 Wigmore, *op. cit.*, Sec. 2228, pp. 224-225.

before of husband and wife "who are as it were one person, being one flesh and one blood".[15] But there can be no question that at the present time this principle has little validity or vitality. Husbands and wives have separate property, may sue each other, and have full political and civil equality. These are not days when rules of evidence can be founded on the concept that husband and wife are one, and that one is the husband.

3. It is on the second reason above given (p. 25), the prevention of marital discord, that the major battle lines have been drawn. This, too, was a basis given by Lord Coke.[16] But this traditional reason has no real validity in a variety of recurrent situations, including the case where the wife is willing to testify:—

(*a*). There is no breach of marital accord where the parties are no longer living together. Such was was situation in *The King* v. *Cliviger*, 2 T.R. 263, 269 (1788), one of the early cases most often cited to support the theory of marital concord. The husband had left his wife, whose testimony was excluded, and had gone off with another woman. The parties were not living together in *Lutwak* v. *United States*, 344 U.S.

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[15] "*qui sunt quasi unica persona, quia caro una & sanguis unus*" 6 Bracton (Twiss, 1883), *Laws and Customs of England* 392, 393.

[16] This reason obviously had no application where a wife wished to testify in behalf of her husband. Excluding her testimony did not contribute to marital peace, but served to disrupt it, by contributing toward his conviction. This was pointed out in 1828 by Livingston, *Complete works on Criminal Jurisprudence*, Vol. 1, p. 456, and again in *Tinsley* v. *United States*, 43 F. 2d 890 (C.A. 8).

604, where the Court decided under Rule 26, in the light of reason and experience, that the privilege against spousal testimony did not exist where the relation of husband and wife was only ostensible. And in the instant case the parties were living apart, further attenuating a conjugal relationship that seems never to have been too substantial.[17] These are not isolated examples. As observed by one commentator: [18]

> Perhaps the most cogent reason of all is that the privilege in no way serves to protect marital harmony, inasmuch as it is ordinarily invoked only when one spouse desires to testify against the other, and where, presumably, the marriage is already on the rocks.

(*b*). Similarly, the supposed reason for the rule has no application where a man is prosecuted for bigamy. The first wife cannot testify as to the fact of the first marriage, or any other fact, because she is, at least *prima facie*, the legal wife and therefore disqualified. But the testimony of the second "wife", whose position in the eyes of the law and society is (to say the least) equivocal, is freely received.[19] The

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[17] Petitioner inadvertently referred to the witness whose testimony is in question as his "ex-wife" and stated, in excuse for his lapse, that they had never lived together very much (R. 46). At the time of the acts complained of, she was living apart from him under an assumed name (R. 8).

[18] *The Search for "Reason and Experience" under the Funk Doctrine*, Comment, 17 U. Chi. L. Rev. 525, 529 (1950).

[19] It is pointed out in 8 Wigmore, *op. cit.*, Section 2231, p. 234, citing *Miles* v. *United States*, 103 U.S. 304, 313, that the husband may be contending that the first marriage was in-

testimony of a mistress is likewise received.[20]

(*c*). If the husband is dead, marital peace cannot be disturbed by compelling his widow to testify, yet there is a "natural repugnance" against denying her the exercise of *her* privilege.[21]

(*d*). Marital peace is as much endangered by a wife's adverse testimony whether the husband is a defendant or may only be incriminated by his wife's testimony. Accordingly, it was first held that the wife's testimony would be excluded in the latter case,[22] but later it was decided that the testimony was admissible, a rule which has been generally followed in this country.[23]

(*e*). The most important situation where marital concord is regarded as an insufficient ground for excluding spousal testimony is where the wrong was committed directly against the spouse. Here an exception was made from the earliest times,[24] but not

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valid and be accorded the privilege as against the second wife. Whether the court allows or rejects such a contention, it has to assume the crucial issue in the case, leading to "inextricable dilemmas" and "unedifying quibbles."

[20] *Batthews* v. *Galindo*, 4 Bing. 610.

[21] See *Stein* v. *Bowman*, 13 Pet. 209, which, however, only hinted at this as a reason.

[22] *The King* v. *Cliviger*, 2 T.R. 263 (1788); *Stapleton* v. *Crofts*, 18 Ad. & El. (N.S.) 367.

[23] *R.* v. *All Saints*, 6 M. & S. 194, 199 (1817); *Baring* v. *Reeder*, 1 Hen. & Mun. 154, 168 (Va.); *State* v. *Briggs*, 9 R.I. 361, 364; *People* v. *Langtree*, 64 Cal. 256, 258, 30 Pac. 813.

[24] See *Trial of Mervin Lord Audley*, 3 How. St. Tr. 401, 414 (1631), admitting such testimony "where the wife is the party grieved, and on whom the crime is committed."

upon the basis that the reason for the rule did not apply. Instead, it was said that there was a "necessity" for receiving the spouse's testimony.[25] But the exception was limited (with some later liberalization in some jurisdictions) to cases of corporal violence directly against the spouse—a restriction which led to some incongruous results. Where a defendant was charged with forging his wife's name, his privilege against her adverse testimony was upheld.[26] Another case upheld the privilege where defendant was charged with stealing his wife's property,[27] and elsewhere it was held that a husband living separately from his wife could not testify where she was charged with burning his home.[28]

Even more startling is the case where defendant took his seven-year-old step-daughter into the woods near their home, ostensibly on some farm chore, and there ravished her. His conviction, based largely on the testimony of the child's mother, was reversed. The court said it would be too narrow an interpretation to confine the exception to cases where there was a physical wrong against the person of the spouse, but it should at least be confined to the cases

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[25] Bentham has his own curious explanation of the "necessity": "A cause between Doe et Ux admits as many fees as a cause between Doe and Roe. In a case where there is nobody to swear for Ux, if Ux were not admitted, there would be no cause, no fees. Rule:—admit her evidence." Bentham, *Rationale of Judicial Evidence* (Bowring's Ed.) Vol. VII, p. 481.

[26] *Ex parte Dickson* 132 S.W. 2d 243, 245 (Mo.)

[27] *Overton* v. *State*, 43 Tex. 616, 618.

[28] *State* v. *McMullins*, 156 Miss. 663, 126 So. 662.

where the wrong directly and vitally affected the conjugal relation, which rape of the child did not.[29] The court felt that relaxation of the rule could lead to unfounded charges as an easy way to bring about termination of the marriage relation.[30]

Many cases hold the same way, in spite of the fact that the mother is frequently the only available witness other than the child herself.[31] In one, the defendant shot and killed his own child in its mother's arms, the bullet passing through the child's head and wounding the wife. Her testimony was held inadmissible to prove the child's murder—an outstanding example of what Bentham calls "the heroic dimen-

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[29] *Cargill* v. *State*, 25 Okl. Cr. 314, 220 Pac. 64. .

[30] This argument had been rejected three hundred years earlier in *Lord Audley's Case*, *supra*, 3 How. St. Tr. 401, 415, where the defendant, charged with certain acts of depravity toward his wife, unsuccessfully urged "That his son was now become 21 years old, and he himself old and decayed; and the one would have his lands, and the other a young husband; and, therefore, by the testimony of them and their servants added to their own, they had plotted his destruction and death."

[31] In *Toth* v. *State*, 141 Neb. 448, 3 N.W. 2d 899, 908, the dissenting judge stated: "The writer of this dissent was district judge for fourteen years and held court in thirty different counties in Nebraska, and, in his opinion, few of the convictions by the jury, or pleas of guilty secured, in incest cases would have been brought about except for the testimony of the mothers in each of the cases of which he has had knowledge." Other cases holding the mother incompetent under similar circumstances are *Lacey* v. *State*, 27 Okl. Cr. 42, 224 Pac. 994; *State* v. *Burt*, 17 S.D. 7, 94 N.W. 409; *Compton* v. *State*, 13 Tex. App. 271.

sions given to the conjugal flame by the sentimentality of * * * lawyers." [32]

A rule offering such advantages to those able to invoke it seems to have led many a person charged with crime to the altar.[33] Whether marital peace results from such unions is to be doubted, but such are the incongruities resulting from the rule that the defendant-spouse can bar the testimony of his mate.

The extreme results of the cases discussed above can perhaps be avoided by giving a more liberal interpretation to the "exception" for crimes against the spouse or the marriage bond, but creating exceptions is an inferior way of dealing with a bad general rule.[34] There is no natural repugnance to permitting a wife to testify to offenses against her child. Nor is there any moral or psychological barrier to permitting a wife *who is willing to do so* from testifying that her husband has repeated to another woman the type of fraud which he practiced against her. See *United States* v. *Walker*, 176 F. 2d 564 (C.A. 2), certiorari denied, 338 U.S. 891. Where the wife is willing to

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[32] Bentham, *Rationale of Judicial Evidence* (Bowring's Ed.), Vol. VII, p. 481.

[33] *State* v. *Chrismore*, 223 Ia. 957, 274 N.W. 3; *Doss* v. *State*, 156 Miss. 522, 126 So. 197 (where the witness' disqualification was accomplished by marrying her, although she was only eleven years old); *Kaul* v. *State*, 43 Okl. Cr. 56, 277 Pac. 278; *Scott* v. *State*, 59 Okl. Cr. 231, 57 Pac. 2d 639; *Moore* v. *State*, 45 Tex. Cr. 234, 75 S.W. 497; *State* v. *McGinty*, 14 Wash. 2d 71, 126 Pac. 2d 1086, 1090. The same has been held in England, *Pedley* v. *Wellesley*, 3 C. & P. 558 (1829).

[34] See Ladd, *A Modern Code of Evidence*, set forth as a comment to the A.L.I. *Model Code of Evidence*, at page 329.

testify to such acts, the resort to marital peace is unrealistic, for at that point marital peace is generally non-existent. See *supra*, pp. 27-28. And against the possibility of some subsequent reconciliation there must be balanced the genuine loss to society caused by a rule which provides that, although the spouse is sufficiently disturbed to be willing to testify, her lips are sealed at the demand of the putative wrongdoer.

We think that most of the problems in this field can be met by ruling that the marital privilege is that of the witness, and not the accused. This creates a standard which has the great advantage of simplicity. It represents a more rational way of dealing with the problem than to continue to nibble from time to time at the old common law rule of incompetency by creating *ad hoc* exceptions. As we show below (*infra*, pp. 33 *ff.*), this view has the support of the civil law, of most writers on the subject, of the laws of some states, and to some extent of tendencies in federal case law.

C. *The great weight of informed opinion favors rejection of the privilege of the accused.*

Since the solution of this particular problem is to be guided by reason and experience, it is proper that consideration be given to the views of students of the law and the experience of other countries.[35]

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[35] Gray, in his *The Nature and Sources of the Law* (1924), at page 281, stresses the importance of expert opinion and writing in the development of the law:

> Notwithstanding the difference in the comparative weight attached to the opinions of judges and of jurists in the Common and in the Civil Law, it is a matter of

Both sources support the view that there should be no privilege on the part of the accused to exclude adverse spousal testimony.

1. The earliest and certainly one of the most outspoken critics of this particular aspect of the law of "baron and feme" was Jeremy Bentham. In his *Rationale of Judicial Evidence* (Bowring's Ed.) Vol. VII, p. 481 (1828), he wrote:

> A rule like this protects, encourages, inculcates fraud * * * It debases and degrades the matrimonial union; converting into a sink of corruption what ought to be a source of purity. It defiles the marriage contract itself, by tacking to it in secret a license to commit crimes.

Edward Livingston, writing in the same period, omitted from his model code of evidence prepared for the state of Louisiana, but which was designed as appropriate for any state, the common law disqualifi-

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prime importance to observe that in both systems alike the development of the Law has been mainly due, neither to the legislatures on the one hand, nor to the people on the other, but to learned men, whether occupying judicial position or not.

And as was said by Dean McCormick of Northwestern University in *Tomorrow's Law of Evidence*, 24 A.B.A. Jour. 507, 581 (1938):

> In the other fields of procedure we have come to see that the road of progress is the way of comparative study. By examining the results of experiments in other states and countries, and by selecting the devices that have proven successful in practice, a body of knowledge of scientific code-making has been developed, with notable recent results. Comparative research and an open-minded willingness to profit by the experience of others, are the path of improvement in evidence law.

cation of husband and wife and any reference to the privilege. *Complete Works of Edward Livingston on Criminal Jurisprudence*, Vol. 1, p. 456, *et seq.* There is some question whether he was influenced to do so by the writings of Bentham, or whether he arrived at the same conclusion by his own independent line of thought.[36] The same view was adopted by Chief Justice Appleton, of the Supreme Court of Maine, in his treatise.[37]

Professor Wigmore's writing has been the basis for most contemporary comment on the subject. No adequate summary of his strongly asserted views can be given within the scope of this brief, but the following gives some idea of the firmness of his conviction (8 Wigmore, *op. cit.*, Section 2228, p. 224):

> We behold the fantastic spectacle of a fundamental rule of Evidence, which had only questionable reasons for existence, surviving none the less through two centuries upon the strength of certain artificial d o g m a s—pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas, to still the spectre of forensic doubt.

The weight of opinion in the legal periodicals is also in favor of abolition of the privilege on the part

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[36] Brosman, *Edward Livingston and Spousal Testimony in Louisiana*, 11 Tulane L. Rev. 243, 255 (1937).

[37] Appleton, *The Rules of Evidence Stated and Discussed* (1860), pp. 144-155.

of the accused.[38] Of more significance in showing the trend of opinion in the legal profession is the report of the American Bar Association's Committee on the Improvement of the Law of Evidence, favoring the abolition of the privilege on the part of the accused,[39] and the omission of the privilege in both the Model Code of Evidence[40] and the Uniform Rules of Evidence,[41] which, however, retain the defendant's privilege as to confidential communications. It has been observed that it is difficult to find any support for the orthodox view among the modern writings.[42]

2. An examination of the codes of a number of

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[38] A partial list of articles and comments follows: Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929); *Rules of Evidence in Federal Criminal Trials*, 47 Harv. L. Rev. 853 (1934); 35 Mich. L. Rev. 329 (1936); 20 Minn. L. Rev. 693 (1935); 24 Cal. L. Rev. 472 (1936); 10 So. Cal. L. Rev. 94 (1935); 11 Tulane L. Rev. 243 (1937); 38 Va. L. Rev. 359, 362-368 (1952); 30 Boston U. L. Rev. 135 (1950); Weigall, *Evidence of Wife against Husband*, 17 Aust. L. Jour. 3 (1943). Finding the doctrine of the *Funk* case somewhat indefinite are: *The Search for "Reason and Experience" under the Funk Doctrine*, Comment, 17 U. Chi. L. Rev. 525 (1950); *Changes in the Federal Rules of Evidence in Criminal Trials*, 43 Yale L. Jour. 849 (1934).

[39] 63 Reports of American Bar Association 595. The American Bar Association has consistently championed uniform federal procedure. 49 A.B.A. Rep. 491; 55 A.B.A. Rep. 521.

[40] A.L.I. *Model Code of Evidence*, Rules 214-217, pp. 151-157.

[41] Rule 23(2) and Rule 28.

[42] 44 Cal. L. Rev. 945, 946 (1956); 14 La. L. Rev. 427 (1954); 30 Boston Univ. L. Rev. 135, 138 (1950).

civil law countries [43] shows a uniform recognition of the privilege on the part of the witness-spouse to refuse to testify. At the same time, these legal systems do not recognize any privilege on the part of the accused to exclude his spouse's testimony, nor have they given the accused a privilege against his spouse's testifying to so-called confidential communications (which are, however, recognized in the attorney-client, the doctor-patient, and a number of other relationships). In a word, the civil law countries—with a uniformity that is remarkable to practitioners accustomed to endless variations between jurisdictions and to subtle distinctions within a jurisdiction—rule that an accused may not object to his spouse's testimony because of the marital relationship, but that the spouse may refuse to testify on this ground. They give the same privilege of refusing to testify to other close relatives.

3. This rule has received some recognition as a rational solution of the problem both in England [44]

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[43] The codes consulted were the following: France—*Code d'Instruction Criminelle*, Art. 322 (Petites Codes Dalloz, 1957); Germany—*Deutsche Gesetze* (Schoenfelder) Sect. 52 (American translation USAREUR Manual 550-155, 27 Sept. 1955); Italy—*Codici per la Udienza Penale*, Sect. 350 (a cura di Sofo Borghese, 1956); Spain—*Ley de Enjuiciamiento Criminal*, Sect. 416 (Instituto Editorial Reus, 1947); Switzerland—*Procédure Fédérale X*, Arts. 74-77 (Recueil édité par la chancellerie fédérale, 1949).

[44] In England, the problem has been attacked piecemeal, with different statutes applying to different offenses. As to some offenses, the testimony of the spouse is both competent and compellable. As to a larger group, the spouse's evidence is competent only. For a listing of these offenses, see *Evi-*

and in this country.[45]

In the federal courts, there has been a tendency toward abandonment of the privilege claimed for the accused. The common law disqualification of the wife to give testimony favorable to the husband was removed by judicial decision in *Funk* v. *United States*, 290 U.S. 371, discussed *supra*, pp. 18-19.[46] While the

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dence of Spouses in Criminal Cases, 99 Solicitors' Journal 551 (1955). See also Weigall, *Evidence of Wife against Husband*, 17 Australian Law Journal 3 (1943). A leading case favoring a statutory construction of spousal competency, but not compellability, is *Leach* v. *Rex*, Appeal Cases (1912), 305.

[45] The statutory provisions of the different states vary from the common law rule of incompetency, with exceptions based on "necessity", to compellability under all circumstances. See 38 Va. L. Rev. 359 (1952); 8 Wigmore, *op cit.*, Sec. 2245, pp. 272-275. The following statutes make spousal testimony competent but not compellable: 15 Code of Alabama, 1940, Sec. 311; General Statutes of Connecticut, Vol. III, 1949, Sec. 8800; General Statutes of Kansas Annotated, 1949 (Corrick), Sec. 62-1420; Kentucky Revised Statutes, 1953, Sec. 421.210; 2 Louisiana Revised Statutes, 1950, Title 15, Sec. 461; 2 Annotated Code of Maryland, 1951 (Flack), Art. 35, Sec. 4; 8 Annotated Laws of Massachusetts, 1956 (Mottla & Hutchins), C. 233, Sec. 20; 3 General Laws of Rhode Island, 1956, Title 12, C. 17, Sec. 10. Two federal statutes of limited application have established this rule: 24 Stat. 635 (1887), relating to polygamy in the Territory of Utah, and 39 Stat. 874, 878, Sec. 4 (1917), 8 U.S.C. 1328, relating to prosecutions for importing aliens for immoral purposes. (38 Boston U. L. Rev. 156, 160, notes that the courts in the New England states favor such a rule.)

[46] In *Stein* v. *Bowman*, 13 Peters 209, the court had sustained the privilege of a widow not to testify against the good name of her deceased husband. Although the language was broader than was required, the holding is one which, for reasons discussed *supra*, pp. 22-24, 29, we believe should still be upheld. Decisions affirming the common law disqualifica-

Court was careful to point out that it was removing the disqualification of a spouse to give favorable testimony and was not passing on the companion question of whether the privilege should also be rejected, nevertheless many of the things said in the opinion were pertinent to both issues. For example, as already pointed out, the Court said that "a rule of evidence should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule" (p. 381), and that the Court has full "power to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past" (p. 382).

In *Wolfle* v. *United States*, 291 U.S. 7, the Court not only reiterated its power to change common law rules in the light of reason and experience (see *supra*, pp. 19-20), but it also made a significant statement (at page 17) concerning the privilege of a husband to exclude allegedly confidential communications made to his wife:

> The privilege suppresses relevant testimony and should be allowed only when it is plain that marital confidence can not otherwise reasonably be preserved.

See also *Pereira* v. *United States*, 347 U.S. 1, 6.

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tion are *Lucas* v. *Brooks*, 18 Wall. 436, 452; *Hendrix* v. *United States*, 219 U.S. 79, 91, and *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 195. See also *Graves* v. *United States*, 150 U.S. 118. *Bassett* v. *United States*, 137 U.S. 496, is also frequently cited in favor of the orthodox view, although the actual holding was merely that a territorial statute in derogation of the common law rule should be strictly construed.

Finally, *Lutwak* v. *United States*, 344 U.S. 604, went to the brink of deciding the issue here presented, but instead the court said, in exercise of its power under Rule 26, that the common law rule as to the privilege of an accused would not apply where the relationship was only a sham.[47]

The weight of judicial opinion in the circuits has been to adhere to the common law rule recognizing the privilege of the accused, until that rule should be rejected by this Court. These courts have done so, however, without expressing any conviction that the privilege should continue to be recognized. The question was first presented after the *Funk* decision in *Yoder* v. *United States*, 80 F. 2d 665 (C.A. 10). This was a prosecution under the Mann Act. Defendant's former wife (who was not the woman involved in the offense) was allowed to testify for the government. The court pointed out that it could have based its decision on the narrower ground that no privilege existed after divorce, but instead it ruled squarely for rejection of the privilege.[48] The Tenth Circuit has

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[47] Justices Jackson, Black and Frankfurter dissented on this point on the ground that privileged testimony was being used to destroy its own privilege.

[48] The decision has been criticized as dictum, because the case could have been decided on the ground that divorce terminates the privilege. While a majority of cases have so held, such has not been the universal rule. See *State* v. *Kodat*, 158 Mo. 125, 59 S. W. 73, where a divorced wife was not allowed to testify that she saw her former husband shoot at a third party, even though they were separated at the time; *State* v. *Raby*, 121 N.C. 682, 28 S.E. 490; *State* v. *Phelps*, 2 Tyler (Vt.) 374; *Reed* v. *State*, 222 Ark. 119, 257 S. W. 2d 362.

adhered to its view in *Yoder* in *Thouvenell* v. *Zerbst*, 83 F. 2d 1003, 1004, although pointing out the question could not properly be raised in a Section 2255 proceeding. It has also, of course, adhered to that position in the instant case, but also basing its decision on the ground that the wife's testimony was harmless, in any event (see Point III, *infra*, pp. 43-44).

Brunner v. *United States*, 168 F. 2d 281, 282 (C.A. 6), involved a situation where a wife was willing to testify that her husband fraudulently accepted a letter addressed to a neighbor lady, containing forty dollars in currency. The Court of Appeals reversed his conviction outright, saying (p. 283):

> Our view is that we must accept the opinion of the Supreme Court in the Graves case as a correct interpretation of the law. It may be that "in the light of reason and experience" the Supreme Court will find it desirable to remove the incompetency of a wife as a witness in a criminal case against her husband, but it has not yet done so.

United States v. *Walker*, 176 F. 2d 564 (C.A. 2), certiorari denied, 338 U.S. 891, sustained the privilege on the part of the accused in a case involving successive frauds of similar nature on various women, including the wife whose testimony was largely responsible for his conviction. The majority, speaking through Judge Learned Hand, said:

> We conclude therefore that we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of abolition of the priv-

ilege, as induced the Supreme Court to action in Funk v. United States, supra.

While the *Funk* case pointed out that a large majority of state legislatures had abolished the incompetency of the defendant—so that it was irrational to retain the disqualification of the defendant's wife, whose incompetence was based on similar grounds—still the law has gone beyond a mere count of what the various state legislatures have done.[49] Rule 26, F. R. Crim. P., states that questions of competency shall be decided upon the principles of the common law, in the light of reason and experience, without limiting experience to what legislatures have done. Both *Wolfle* and *Lutwak* recognized the plenary power of the Court to lay down its own rule, without waiting for either action by the state legislatures or an express change by Congress. See Point I, *supra*, pp. 13-21. We submit that it is not necessary to wait for explicit action by Congress, because Congress has already expressed its will that the Court should act independently on matters of evidence.[50]

While, as stated above, we think that reason and experience support the view that a spouse should not be compelled to testify against her will, we also believe that neither reason nor experience support the

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[49] The dissent in *Walker* gives a comprehensive view of the decisions leading in the direction of rejection of the privilege and states that Rule 26 imposes a duty on the courts to find a new and rational rule.

[50] By 18 U.S.C. 3771, cited above, providing for formulation of the Rules. See also *McNabb* v. *United States*, 318 U.S. 332, 340.

view that the spouse should not be allowed to testify when she is willing to do so. This Court, we submit, should lay down the rule that the privilege is that of the witness-spouse, and not that of the accused.

III

In Any Event, The Challenged Evidence Was Harmless

The Court of Appeals ruled that, even if the testimony of the wife was erroneously admitted, the error was harmless (R. 57-58). The record fully supports this alternative basis of the judgment. The separated wife testified to only two things which in any way bore on the guilt or innocence of the accused: (1) That she had been a prostitute; and (2) that petitioner did not know about it. The latter testimony was, of course, not prejudicial but helpful to accused, so that the only testimony which now has any conceivable importance is her admission that she was a prostitute.

This fact was, however, otherwise proved by uncontroverted evidence. It appeared from the testimony of the hotel clerk, who was in a position to know. See the Statement, *supra*, p. 5. It also appeared from the testimony of Lola Fay Moudy, who told how the witness took her in charge and instructed her as to her work. *Supra*, p. 4. The other girl admitted that she was a prostitute and she was the one who paid Lola Moudy's fine when the latter was unable to contact the witness in question. *Supra*, p. 5. The status of the witness also appeared circumstantially by the fact that she was living at a hotel away from home under an assumed name. See *supra*, pp.

4-5. And whatever significance the testimony might otherwise have had in the government's case was dissipated when petitioner admitted that the witness was a prostitute at the time in question. He testified that he found out definitely that such was the case when he brought Lola Moudy back from Arkansas (R. 47).[51] In the particular circumstances of this case, the testimony of the wife added nothing to the proof of petitioner's guilt, and if error was committed it was harmless.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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SEPTEMBER 1958.

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[51] The fact that Jane Wilson (*i.e.*, Erma Lane Hawkins) was petitioner's wife had been repeatedly referred to by petitioner's counsel himself in cross-examination of Lola Fay Moudy, the complainant witness (Tr. 21, 22, 23).

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